1991

Robert J. Debry and Joan Debry v. Del K. Bartel, Dale Thurgood, and Lee Allen Bartel : Petition for Rehearing

Utah Supreme Court

Edward T. Wells; Robert J. Debry and Associates; Wallace R. Bennett; Attorneys for Appellant.
Del D. Bartel; Pro-Se; Dale Thurgood; Pro-Se; Lee Allen Bartel; Pro-Se.

BRIEF

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IN THE UTAH SUPREME COURT

ROBERT J. DEBRY AND JOAN DEBRY	)	
	)	
Plaintiffs / Appellant	)	PETITION FOR REHEARING
	)	
Vs.	)	
	)	
DEL K. BARTEL, DALE THURGOOD,	)	Case Nos. 910216
and LEE ALLEN BARTEL	)	910284
	)	910308
Defendants / Appellees	)	
	)	

RESPONSIVE PLEADING TO THE JULY 1, 1994 OPINION AS RENDERED BY THE SUPREME COURT

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SECTION I

INTRODUCTION

This Court must act to correct a disastrous mistake in setting aside valid unanimous jury verdicts which defined the improper, fraudulent and conspiratorial acts of an attorney, based upon compelling and undisputed evidence presented at trial. While we appreciate its efforts to arrive at a reasonable opinion based upon *Sua Sponte* investigation, several findings of the court do not stand up to closer scrutiny and demand further review. To dispute the jury in the manner the court now contemplates would amount to a travesty of justice. We therefore ask the Court to invest a little more time and effort to get to the truth of the matter.

Pro-Se Defendant/Appellees Del K. Bartel, Dale Thurgood and Lee Allen Bartel hereby submit their petition for rehearing of the appeal and cross appeal as designated above pursuant to Rule 35 Utah Rules of Appellate Procedure. Defendants state that this petition is presented in good faith and is not interposed for delay and rely upon the following facts and points of law that they assert the court must further consider;

MATERIAL FACTS

1. This appeal/cross appeal stems from case No. C86-553 in the Third District Court wherein a unanimous jury rendered its decision on June 20, 1990, under a special verdicts form, that plaintiffs Robert J. DeBry and Joan DeBry were guilty of breach of contract, active interference, two separate counts of fraud and conspiracy to defraud as against defendants.

2. That plaintiffs received an award in this action in light of a directed verdict ordered by that court based upon a Masters Panel Report dated May 18, 1990 as created pursuant to a stipulated settlement agreement stemming from a bifurcated trial on plaintiffs masonry and related structural claims in February, 1990.

3. On or about July 1, 1994 the Supreme Court rendered its opinion wherein it basically denied the appeal and cross appeals of the parties with the exception of setting aside the directed verdict of the court and the jury's findings of fraud and conspiracy as against the DeBrys.

ARGUMENT

POINT I

THE PREVAILING PARTY ISSUE

IS PROPERLY BEFORE THE COURT

While this court declined to rule on the issue of prevailing party under the cross appeal, based upon the assertion that defendants do not claim they raised this issue below nor could the court find any indication that they did so, (opinion at 15) such is not the case. The prevailing party issue was raised as follows:

1. Defendants specifically addressed the issue below under the Reply To Plaintiffs Motion To Clarify, Alter Or Amend Judgement And For Final Ruling Upon Defendants Post Trial Motions Point V, dated April 22,1991. (p 13149 - 13158, Exhibit A)

2. This matter was argued at hearing in the District Court on May 5, 1991. (Exhibit B. - transcript of hearing pages 2-14, 46,47)

3. Appellees notice of appeal dated June 18, 1991 included a copy of the judgment wherein this issue was referenced at paragraph 5. (Ref Appellate Court Record)

4. Defendants docketing statement dated July 9, 1991 and amended docketing statement dated September 20, 1991 at paragraph 3(e) cite the claim that the District Court erroneously refused to designate defendants as the prevailing party in this case. (Ref - Appel Ct. Record)

5. Plaintiffs have failed to contest or dispute defendants prevailing party claims, as made under point V of appellees brief, nor did they contend this issue is presented for the first time on appeal because they were acutely aware of the fact that this issue was raised, argued and erroneously ruled upon below. The defendants are the prevailing party in this case and the jury verdict and applicable case law demands that ruling.

POINT II

KENNETH KARREN JR.'S TESTIMONY WAS CLEARLY INADMISSIBLE

The matter involving Kenneth Karren Jr.'s testimony rendered on behalf of the DeBrys has been relegated to a vacuous footnote (No. 7 at p. 15) in the Court's opinion. The issue of "Bill Karrens'" inadmissible testimony as submitted at trial must be reviewed for the following reasons:

1. Defendants submitted argument under point III of

appellees brief at 37-40 and section III point X of appellees reply brief in support of their contentions.

2. Specific citations to the trial transcript and exhibits submitted at trial factually prove that Karren Jr. falsely testified as a licensed contractor at trial, then falsely held himself out as the agent of a licensed contractor, subsequently submitting an invalid bid for repair of alleged defects at trial. (Ref tr. 815, 816, 825, 842-845, 900, 934-935, documents - app brief 1(1), 1(2), 2(21), 2(22))

3. Kenneth Karren Jr., as a Masters Panel member and judicial officer (See Plumb v. State 809 P. 2d at 734), appointed pursuant to Rule 53 Utah Rules Of Civil Procedure, should have distanced himself from exparte actions such as preparing the bid for repairs as a licensed contractor for the DeBrys in the same action. (plaintiffs only submitted evidence under their theoretical costs of repair). Defendants further reference Rule 605 Rules Of Evidence in this regard.

4. These issues were raised under defendants motion and memorandum in the lower court on January 14, 1991. (Ref 12936 - 12986) Based upon the facts of the matter the court must find that Karren Jr.'s testimony was inadmissible and set aside any award stemming therefrom.

POINT III

SETTING ASIDE OF THE DIRECTED VERDICT ELIMINATES ANY DEBRY AWARD

This opinion properly set aside the trial courts directed verdict but failed to fully apply that correct decision. The

court will note that the jury found that defendants were not negligent in the construction of the building. (Sp. ver. No. 1) Defendants did not breach the implied warranty of good workmanship (4b) the express warranty that the building would be free from defects (4c) the express warranty of occupancy (4d) the implied warranty of habitability (4e) and implied warranty of fitness for intended purpose (4f).

Under the auspices of the erroneous directed verdict the jury was forced to find that defendants failed to construct the building according to the requirements of the Uniform Building Code. (4a, 16, 17, 18) Plaintiffs only awards, under the related breakdown of categories of repair include the following schedule; Masonry - $30,000, West stair - $675, Architectural - $7,000, miscellaneous - $10,000 (sp. ver. para. 18). The architectural award of $7,000 and miscellaneous award of $10,000 do not involve Uniform Building Code violations. Once the masonry and related structural claims have been removed pursuant to the February 1990 Stipulated Settlement Agreement, no resultant damage claim remains. (Defendants would further assert that Architectural matters were addressed in that Settlement Agreement as well. See Appl. Brf. - 2(12))

POINT IV

THIS COURT MUST ADDRESS THE MASTERS PANEL ISSUE

Defendants dispute the Supreme Courts' failure to address issues directly involving the May 18, 1990 Masters Panel Report issued pursuant to Rule 53 Utah Rules Of Civil Procedure (App.

Brf. - Section II - 2(d)). With virtually no definitive Utah case law on the books in regard to Rule 53 and in light of the plaintiff/attorney's wrongful actions, it is incumbent upon the court to rule in regard to the DeBrys secret preparation of the Masters Panel Report as submitted at trial (App 2(13), 2(14)), DeBrys exparte communications with the panel (App 2(13), 2(14), the fact that one panel member testified he was prevented by the DeBrys from completing his work (App. 2(18), 2(20)), the fact that DeBry paid off the other two panel members himself (App. 2(17)), the fact that the remaining two members under DeBrys direction later unilaterally provided a second report replacing the first report (App. 2(19)), the fact that the panel acted outside the scope of the reference (App. 2(12), 2(19)) and that a master (licensed engineer) offered his bid and testimony as a licensed contractor, as a paid witness, on behalf of the DeBrys at trial. This issue was presented to the trial court in post trial motions (R. 12939 - 12986) and on appeal (Appl Brf. Pt. III, Appl. Rep. Brf. at pt. X) and calls for the courts definative review.

POINT V

THE COURTS FINDINGS IN REGARD TO THE FRAUD, CONSPIRACY AND PUNITIVE DAMAGE AWARDS ARE MADE IN ERROR

The defendants take issue with the courts opinion in regard to the fraud and conspiracy counts and the punitive damage award as rendered by the jury and as upheld by the court and emphasize the following points:

1. Initially, the issues pertaining to the fraud and conspiracy findings of the jury are not properly before this court. Plaintiffs failed to ever present any objection or argument in reference to these charges prior to trial, at trial or in post trial motions. Further, plaintiffs did not oppose these findings at trial when the verdicts were read and allowed the jury to be dismissed without objection. Plaintiffs misrepresented the facts when they declared that objections were rendered in this regard under post trial motions at R 11505-29 and 11791-916. Careful review of those pleading reflects the facts that fraud and conspiracy issues were not mentioned as an issue contested! (Exhibit C and D) Defendants previously referenced that fact (Appl rply brf - section I point 1) but this argument was apparently overlooked or ignored. Defendants further rely upon facts and case law cited under appellees' brief - Point II, Point III, Appl. reply brief - sections I - Point 4,5,8.

2. Even if the court could somehow construe DeBrys' pleading as valid underlying objections to the fraud and conspiracy verdicts, under plaintiffs motions for a verdict and judgment n.o.v., (11505-11529 and 11791-11916) these matters are not properly before the court due to the acknowledged fact that the DeBrys failed to marshall the evidence as is required to even consider overturning these jury verdicts.

3. Due to the fact that plaintiffs failed to properly marshall all the evidence concerning the fraud and conspiracy findings, and the fact that all the evidence was not before this

court, it must modify its evaluation of these jury verdicts as follows;

A. The court mistakenly concludes that defendants failed to rely upon Debrys' misrepresentations to their detriment in charging the defendants with defective work that was done by someone else. That conclusion is in error. Based upon DeBrys' insistence that defendants subcontractors and or employees performed defective work on the building, defendants agreed to the scheduling and management order of the court (R. 4742-4746) voluntarily reentered the building in the fall of 1987, paid for new building permits, revised plans, new engineering specifications (in conjunction with Salt Lake County engineers and inspectors and DeBry engineers) to address every defect verified and found in the building. Defendants incurred $27,719.81 (Exhibit E) in direct costs in this performance, in reliance upon DeBrys false assertions that defendants employees and or subcontractors were responsible for a substantial number of defects in the building. (Tr. 1560-1563 and 790-796 Exhibit F) Defendants paid for the resolution of every defect found at that time, with the exception of two matters DeBrys refused to allow correction of - wire glass windows/parapet wall - or set back problems. (R 5070- 5073)

These facts were presented at trial in 1990 (Tr. 770, 771, 793-796, 1172-1176,1151-1153, 1081, 1560-163; trial Exhibits (247, AAA) The jury weighed this strong evidence in making its factual determinations and found that defendants relied upon

DeBrys' false representations concerning cited defects to defendants damage and detriment and this court cannot properly substitute its evaluation of the evidence for that of the finder of fact. Defendants further note that the trial courts' judgment, in absence of clear and specific facts supporting abuse of discretion, cannot be challenged. Barber v. Calder 522 P. 2d at 700; Donohue v. Intermtn Health Care, Inc. 748 P. 2d 1067 (Utah 1987)

Defendants specifically reference Conder v. A. L. Williams & Associates, 739 p. 2d 634 (Utah App. 1987) in regard to the element of reliance wherein the court again found that reliance must be considered with reference to the facts of each case, and it is usually a question for the jury to determine. See Berkeley Bank for Coops. v. Meibos, 607 p. 2d 798, 801 (Utah 1980) Although it is impossible to draw precise legal boundaries of when reliance is reasonable the courts have given some direction. Johnson v. Allen, 108 Utah 148, 158 p. 2d 134, 137 (1945) Generally, a plaintiff may justifiably rely on positive assertions of fact without independent investigation. See Dugan v. Jones, 615 p. 2d 1237, 1247 (Utah 1980) Prosser & Keeton, The Law of Torts, 108, at 749-54 (5th Ed. 1984)

It is apparent that DeBrys actions constitute innovative and unusual fraudulent conduct. In this instance plaintiffs take advantage of Robert J. DeBrys position in the community as an attorney and owner of a large law firm to use litigation and to some degree the court to perpetrate this fraudulent and

conspiratorial behavior. These actions are addressed in part as follows:

> Fraud is a generic term which embraces all the multi-farious means which human ingenuity can devise and are resorted to in order to gain an advantage over another. In its general or generic sense, it comprises all acts, omissions, and concealment involving a breach of legal or equitable duty and resulting in damage to another.
>
> 37 C.J.S. Fraud s 1

B. The court also misconstrues the jury's second fraud finding. While the court characterizes this verdict as concerning "payments due under the note" the jury verdict actually found that plaintiffs conspired to defraud defendants of payments due (sp. ver. 31) and that plaintiffs fraudulent action was a proximate cause of damage to the defendants. (sp. ver. 32)

Evidence provided at trial addressed all nine (9) elements of fraud. (Ref Appl. Brf. Point V, Appl. Rply. Brf. - points XIII, IX) Evidence was presented showing that as part of the sale more than $152,858 of defendants proceeds were placed in escrow, pursuant to the closing documents. (Exhibit G) at the time of sale and after to facilitate the taking of these monies. Witness David Jorgensen admitted at trial wrongful actions performed in concert with plaintiffs involving the plan or scheme to take defendants escrowed funds (1364 -1365, 1401-1408, 1413-1414) including the fabrication and implementation of a false document designed to take defendant's escrow, expand the litigation and sue Utah Title and Abstract Company and later Fidelity National Title Co, (Tr. 1364-1365, 1401-1406) with the DeBrys ultimately filing suit against Jorgensen himself to shut him up. (Tr. 1404-

1408, 1413-1414) Evidence was presented to show that DeBrys' actions, including the filing of false, misleading and contrived documents at closing and after to promote the issuance of the complaint (R. 4760-4899) in order to assert wrongful claims against monies due defendants, which defendants have not yet received due to DeBrys ongoing claims against escrow in the bankrupcy court. (Exhibit H) (This courts comment concerning the jury's finding that plaintiffs did not conspire to file a lawsuit before the closing (Sp. Ver. 33) is a distinct and separate claim irrelevant to the courts findings under special verdicts 31 and 32.)

C. The courts opinion concerning punitive damages also disregards the jury's finding of intentional active interference against the DeBrys (verdicts 26, 27 - sp ver. form, App 2(11)) which constitutes negligent action sounding in tort. The fact that the DeBry's were found to have knowingly and willfully proceeded to interfere further reflects blatant and unconscionable tortious conduct, in and of itself justifying the punitive damage award. This jury verdict is also not before the court, was not designated on appeal and precludes this court from setting aside the punitive damage award.

The other test that is not addressed or demonstrated by plaintiffs is that reasonable persons could not have concluded as the jury in reaching its decision. DeBry v. Hilton Travel Services, Inc. v. Capital Intern. Airways, Inc., 555p.2d 201 874 (Utah 1976); Nuhn v. Broadbent, 507 p.2d 371 (Utah 1973)

POINT VI

THE COURT'S OPINION CITES OTHER MATTERS THAT CALL FOR COMPLETION

Due at least in part to the parties lack of guidance through more than 13,500 pages of the trial record, ten volumes of trial transcript and as a result of eight and one half years of protracted litigation, this court has drawn partial conclusions that call for completion.

The Court recognizes DeBrys litigious actions (Opinion at p.3) but fails to acknowledge the full nature and extent of his wrongful conduct. The DeBrys intentional misrepresentations are confirmed, but all the facts governing the frauds are not fully analyzed. (Opinion at 6) The Court understands the DeBry attacked the jury verdicts without marshalling the but fails to apply this fact to each jury challenge. (Opinion p. 9 para. 1, Footnote 3 p.9) The aforementioned facts and evidence as referenced under points I through V should assist this Court in bringing this matter to a proper conclusion.

CONCLUSION

Historically, every appellate court in this country, and more particularly the Utah Supreme Court, is charged with the duty, where there has been a full trial of the issues, and the trial court has made findings and entered judgment thereon, to review the evidence and all reasonable inferences that may have been fairly drawn therefrom, in the light most favorable to the jury's findings, the judgment, and the contentions of the prevailing party. Where conflicts exist the court must consider

as true, the evidence that supports the verdict and the court will not substitute its evaluation of the evidence for that of the jury.

Review of the lower court record clearly reflects the fact that the issues involving prevailing party, the inadmissible testimony of Kenneth Karren Jr. and the invalid Masters Panel Report were submitted and ruled upon and are properly before this court.

On the other hand issues involving fraud and conspiracy were never addressed below, and even if they had been plaintiffs failed to properly marshall all the evidence in order for the court to give those matters complete and thorough consideration.

The tort of intentional active interference, an unchallenged finding against the DeBrys not before this court, in and of itself precludes the vacating of the punitive damage award.

While the court did find that the courts directed verdict should be set aside it must carry that finding to its logical conclusion.... that DeBrys ultimately receive no award.

We therefore ask this court to re-evaluate these narrow issues and modify its opinion in light of the appellate court rules that apply, the evidence submitted at trial, the applicable case law, the jury verdict, the judgment and the "actual facts" if the case as opposed to the distorted representations of the DeBrys and ultimately due to the fact that we were the prevailing party in this litigation. Any other prospect would serve to substantially deny defendant/appellees of their rights of due

process.

Respectfully submitted this 15th day of July, 1994.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT J. DeBRY and JOAN DeBRY, Plaintiffs, vs. CASCADE ENTERPRISES, et al., Defendants.	CASCADE DEFENDANTS' REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO CLARIFY, ALTER OR AMEND JUDGMENT AND FOR FINAL RULING UPON DEFENDANTS' POST-TRIAL MOTIONS Civil No. C86-553 Honorable Pat B. Brian

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Defendants Del K. Bartel and Dale Thurgood, individually, and as to their respective partnership interest in Cascade Enterprises and Cascade Construction, and Lee Allan Bartel, individually, and as to his partnership interest in Cascade Construction, hereinafter referred to as "Cascade defendants", hereby offer the following response to plaintiff Robert J. DeBry's memorandum, proposed judgment and plaintiff's letters dated April 16, 1991:

PERTINENT FACTS

The following additional facts specifically controvert representations made by plaintiffs.

1. Evidence produced at trial established the following:

(a) There was no owner/contractor relationship between plaintiffs and Cascade defendants.

(b) Tri-K Contractors was a licensed general contractor who entered into a direct contract with Cascade Enterprises. (T.T. - page 750, lines 10-25; page 751, lines 1-5; page 779, lines 11-24.)

(c) The December 10, 1985, Escrow and Non-Merger Agreement prepared by plaintiffs for the aborted closing on that date was a void document replaced by the December 13, 1985, Final Settlement Agreement plaintiffs took benefit under on the December 13, 1985, closing and sale. (T.T. - pages 781-786.)

(d) It was established at trial that plaintiffs were in default on the Trust Deed Note as of December 13, 1986, with interest accruing at 17% on the balance due and owing of $70,000.00 as of that date. (Ref. - Trust Deed Note.)

2. In regard to the bifurcated trial held on February 28, 1990, the following facts were established:

(a) The settlement agreement negotiated and agreed upon directly involved the DeBrys and defendants Sherwin Knudsen and Tri-K Contractors. (Ref. - Order at Trial.)

(b) Only Tri-K Contractors and Sherwin Knudsen, as defendants, and the DeBrys, as plaintiffs, participated in the selection of the masters panel, the expenses of the panel, payment for necessary testing, supervision of repair work and the

actual cost of masonry repairs. (Ref. - Order at Trial.)

(c) *All matters regarding plaintiffs' claims in regard* to the masonry were resolved by this settlement with the exception of the consequential damage claims pertaining thereto. (Ref. - Order at Trial.)

3. Cascade defendants did not stipulate to accept any responsibility for any costs relating to inspection, testing, supervision or repair of masonry on the building. (Ref. - Order at Trial.)

4. Cascade defendants did, in fact, object to the Masters' Panel Report at the main trial held on May 21, 1990, at the time the report was submitted at trial by the plaintiffs, during trial when Edward Wells, plaintiffs' co-counsel, repeatedly offered characterizations of the report, also in regard to plaintiffs' consequential damage claims, and in response to plaintiffs' motion for directed verdict under the Masters' Panel Report, prior to closing arguments. (T.T. - page 558, lines 7-11; pages 1645-1647; pages 217-218.)

5. Cascade defendants further objected to any damage award relating to the directed verdict and the Masters' Panel Report in post-trial motions, including their objection to the memorandum decision issued by the court.

ARGUMENT

POINT I

PLAINTIFF'S ARGUMENTS ARE NOT FACTUAL OR RESPONSIVE TO THE ISSUES AT HAND.

A review of plaintiff's memorandum reflects the fact that plaintiff is attempting to relitigate old issues previously

settled. Contrary to plaintiff's allegations, the birfurcated trial involving masonry defects was reduced to settlement on February 28, 1990. On June 20, 1990, a unanimous jury rendered its decision regarding plaintiffs' breach, active interference, fraud and conspiracy to defraud, based upon the evidence presented at trial, including plaintiffs' void Escrow and Non-Merger Agreement and the Final Settlement Agreement which replaced it. Plaintiff ignores the fact that the jury found that Cascade's assertions in regard to the Trust Deed and Note were, in fact, true. Included in that decision was the finding that plaintiffs conspired to defraud defendants at the closing and sale of the building.

POINT II

PLAINTIFF MISCHARACTERIZES THE APRIL 5, 1991, CONFERENCE.

Cascade defendants dispute the representations made by plaintiff in regard to the April 5, 1991, conference. The court did not find that there was no basis in fact or law for the imposition of treble damages against plaintiffs' alleged misconduct at trial. The court actually stated that those specific issues would not be ruled upon by the court, but would have to be addressed another day, in another court, and in conjunction with that statement, the court also stated that damages under active interference should also be included in a new complaint if defendants chose to proceed under that finding. The court further addressed the forwarding of contemptuous conduct charges against Robert J. DeBry and Edward T. Wells in this case to the presiding judge for disposition.

which you have stipulated." (T.T. - page 1647, lines 18-19, 22-23.)

The Court: "The motion for the parties to be bound by the masonry report is granted. The question before the jury now is whether or not consequential damages flowed from the alleged masonry defects." (T.T. - page 1648, lines 16-19.)

Based upon these specific and clear facts there can be no question that the $30,000.00 in masonry repairs claimed by plaintiffs against Cascade are improper and must be disallowed.

POINT V

CASCADE DEFENDANTS ARE ENTITLED TO COSTS, ATTORNEY'S FEES AND COSTS OF COURT.

Cascade defendants contend that they are entitled to their costs in this matter pursuant to Rule 54(d)(1) Utah Rules of Civil Procedure, due to the fact that Cascade defendants were the prevailing party in this case and more specifically due to the fact that the parties voluntarily entered into the Trust Deed with Assignment of Rents #UT 105660, wherein plaintiffs specifically agreed to pay all costs associated with the enforcement of that document.

It is noted that plaintiffs failed to prevail in nearly every phase of their complaint against Cascade defendants, including negligence, breach of implied warranty, implied warranty of good workmanship, express warranty of occupancy, implied warranty of habitability, implied warranty of fitness for intended purpose, consequential damages, breach of contract, alternate negligence and fraud. On the other hand Cascade defendants sustained every claim made against plaintiffs at trial.

The courts have consistently held the prevailing party in a suit is entitled to costs and attorney's fees when they are provided for by statute or contract. Besinger v. Behunin, 584 P.2d 801 (Utah 1978); Stubbs v. Hemmert, Utah 567 P.2d 168 (1977), Utah 93, 1P.2d 950, 75 ALR 1393.

CONCLUSION

Cascade defendants have submitted to the court and to plaintiffs a proposed form of judgment that incorporates the necessary adjustments to the memorandum decision to render a final judgment in this case and to make way for this action to proceed on appeal. There is no question that resolution of the masonry defects issue, previous interest stipulation and costs are valid considerations that the court should rule upon in favor of Cascade defendants to facilitate final conclusion of this phase of litigation.

RESPECTFULLY SUBMITTED this 22nd day of April, 1991.

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Attorney Pro Se for Defendants
Cascade Enterprises, Cascade
Construction and Del K. Bartel

DALE THURGOOD
Attorney Pro Se for Defendants
Cascade Enterprises, Cascade
Construction and Dale Thurgood

LEE ALLAN BARTEL
Attorney Pro Se for Defendants
Cascade Construction and
Lee Allan Bartel

DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing CASCADE DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO CLARIFY, ALTER OR AMEND JUDGMENT AND FOR FINAL RULING UPON DEFENDANTS' POST-TRIAL MOTIONS was hand-delivered to plaintiff Robert J. DeBry's attorney, Alan L. Sullivan, VAN COTT, BAGLEY, CORNWALL & McCARTHY, Suite 1600, 50 South Main Street, Salt Lake City, Utah 84144; and mailed to plaintiff Joan DeBry, 5320 Baywood Circle, Holladay, Utah 84117, this 22nd day of April, 1991.

Vickie Bartel

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * *

ROBERT J. DEBRY and JOAN DEBRY, Plaintiffs, -vs- CASCADE ENTERPRISES, et al., Defendants.	Case No. C86-553 Honorable Pat B. Brian MOTION IN RESPONSE TO COURT'S MEMORANDUM DECISION
CANADA LIFE ASSURANCE CO., Plaintiff, -vs- ROBERT J. DEBRY, et al., Defendant.	

* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Salt Lake City, Utah

May 5, 1991

* * *

BRAD J. YOUNG
OFFICIAL COURT REPORTER

P R O C E E D I N G S

THE COURT: Debry vs. Cascade Enterprises et al., C86-553. Counsel will state an appearance

MR. SULLIVAN: Alan Sullivan here today on behalf of the plaintiff Robert Debry.

MR. HUGHES: Robert Hughes on behalf of Tri-K Contractors, your Honor.

MR. THURGOOD: Dale Thurgood pro se.

MR. LEE BARTEL: Lee Bartel pro se.

MR. DEL BARTEL: Del Bartel pro se.

THE COURT: You may proceed.

MR. DEL BARTEL: Your Honor, Cascade defendants' motion is in response to the Court's memorandum decision, and involves several outstanding issues. While we had a discussion, a conference on April 5, I believe that there are still three matters that remained outstanding after that -- after those discussions were held.

THE COURT: Identify them for the record.

MR. DEL BARTEL: The first one is the issue of masonry defect damage -- the masonry defects damage award of $30,000, included in the special verdicts form. The second issue involved the August 3, 1990 order after hearing. And the third item was Cascade defendants' costs -- attorney's fees and costs of court.

In regard to the first issue, involving masonry

defects claims, the Cascade defendants contend that those issues were previously adjudicated at the prior severed trial which occurred on February 28 of 1990. At that time the plaintiffs and Tri-K Contractors, Sherwin Knudsen, entered into a stipulated settlement agreement, in which Cascade was a nominal party. We would point out to the Court that the -- that Tri-K and the plaintiffs had previously discussed settlement prior to the trial. At the time of trial and after the jury had been selected, I believe it was Mr. Hughes, on behalf of Tri-K, indicated to the Court that there was an outstanding settlement possibility. The Court invited the plaintiffs and Tri-K to enter into further settlement discussions, if that was their wish. They chose to do that. And Cascade defendants were excluded from those discussions.

Later on, a settlement, a stipulated settlement agreement was read onto the record by and between those parties. Mr. Hughes was then excused from that trial, and left here, and the Debrys attempted to pursue a consequential damage claim against Cascade defendants. At that time Cascade objected, saying that there was no proof of direct damages. That was why the panel was picked in the first place, was to determine what, if any, defects existed in the masonry in the building. Based upon Cascade's argument, the Court ruled that, in fact, consequential damages could not be heard at that time.

Plaintiffs then attempted to rescind the settlement agreement that they had entered into between themselves and Tri-K. Mr. Hughes was recalled from his office, back over to the Court. Further discussions were held. And the upshot of it was that Cascade defendants agreed to a stipulation that the masters panel report could be read at the main trial on the issue of consequential damages. There was some further argument in regard to the propriety of the structural engineers that were to be appointed on the panel, to make any decisions about contractor's licensing, building permits, and approved plans. And the Court ruled that, in fact, anybody could say anything at trial, and we were entitled to defend those issues at the main trial.

Subsequently, at the main trial, the masters panel report was read, over the objections of Cascade defendants at various points. The jury ultimately made a ruling that the direct damage cost for the defects involving masonry would equal $30,000. Cascade contends that the only issue that could be heard at the main trial, in regard to masonry, was that issue involving the consequentials. We feel that the order at trial, on February 28, clearly enunciates what went on. It clearly describes what Cascade stipulated to.

On item 6 of the order at trial, there is a series -- it states as part of the written report referred to in paragraph 4 above, the panel would answer the following

specific questions. And there were six subparts to that question, which involved the building permit issue, the contractor's licensing issue and the issue of approved plans. I would note that the special verdicts form, the jury found that in fact Cascade defendants did have a contractor's license, that they did have a proper building permit, and that they did work under approved plans. Those were the only outstanding issues that involved that area of the order at trial.

Our contention is we were excluded from the initial settlement agreement. Ultimate responsibility was accepted by Tri-K and Sherwin Knudsen. Plaintiffs accepted Sherwin Knudsen and Tri-K as having the ultimate responsibility to either repair or pay for the costs of the masonry defects. Therefore, any claim involving direct damages on the masonry would be held -- Tri-K would be held ultimately responsible for.

The second area that we address is the stipulation that occurred after trial, and it involved plaintiffs' motion for stay of proceedings, which was heard on August 3 of 1990. Plaintiffs were seeking additional time to obtain the transcript of trial to pursue their motion for judgment notwithstanding the verdict; or, in the alternative, a new trial. And defendants had a concern that a substantial amount of time would elapse before the transcript would be available,

and they would then have an opportunity to review it and then respond to the Court. At that time plaintiffs agreed, specifically, to allow for a 12-percent interest to run on judgments in favor of the defendants from the date of the verdict on. And we asked the Court to acknowledge that.

THE COURT: Is that a disputed issue today?

MR. SULLIVAN: It is not, your Honor.

THE COURT: You may proceed.

MR. DEL BARTEL: The third issue involves costs. Cascade defendants believe that they are entitled to their costs of court, attorney's fees, and additional costs in proceeding with the case, consistent with Rule 54 (d)(1) of the Utah Rules of Civil Procedure, and also in conjunction -- which calls for -- states that the prevailing party is entitled to their costs.

THE COURT: That's the question that has confronted the Court since the jury verdict was entered. Who is the prevailing party?

MR. DEL BARTEL: Cascade's position is that the defendants had a -- their ninth amended complaint consisted of 74 pages of accusations, of which two pages contained the defects, cited defects issue. There was 203 defects that were cited. The ultimate ruling by the jury was on three: miscellaneous damages, which were not cited in the complaint; architectural damages, which were not cited in the complaint;

and the masonry issue, which is part of our objection today.

On the other hand, Cascade believes that, in fact, the special verdicts form shows that the jury sustained all the principal causes of action of the defendants, which included fraud, conspiracy, breach, and active interference.

We further contend that the trust deed with assignment of rents -- leases, excuse me, which was signed by the parties, calls for the payment of costs in the event of a default.

THE COURT: Cite the Court the appropriate language on which you rely.

MR. DEL BARTEL: Under paragraph 6 --

THE COURT: Identify --

MR. DEL BARTEL: Paragraph 6 of the trust deed note, number UT105660. "Should trustor fail to make any payment or to do any act as herein provided, then beneficiary or trustee, but without obligation to do so and without notice to or demand upon trustor and without releasing trustor from any obligation hereof, may make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof. Beneficiary or trustee being authorized to enter upon said property for such purposes, commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of the beneficiary or trustee, pay, purchase, contest or compromise any

encumbrance, charge or lien which, in the judgment of either, appears to be prior or superior hereto, and in exercising any such powers incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefore, including costs of evidence of title, employ counsel, and pay his reasonable fees."

THE COURT: Stop for just a moment. The Court has reached a preliminary decision on the awarding or nonawarding of fees and costs pursuant to Rule 54. The Court has some interest in plaintiffs' response to the provision for fees and costs pursuant to the express language of the trust deed note. Would you like to respond?

MR. SULLIVAN: I would be happy to, your Honor. First of all, on attorney's fees, these people have been representing themselves pro se in this case. I don't understand what they are arguing for award of attorney's fees.

Secondly, costs, quite frankly, I did not understand the language that they read to entitle them to costs. Nevertheless --

THE COURT: Would you like to refer to the language that was cited in the trust deed note? Take just a moment and refer to the appropriate language, and then you may respond.

MR. SULLIVAN: It is correct, your Honor, that they are entitled to their attorney's fees, if they say so here, their costs, if they prevail in an action under the trust

deed. What I am trying to argue, your Honor, is that is the same rule as Rule 54 provides. That is, the prevailing party in any action is entitled to costs. It doesn't answer the question, who is the prevailing party?

THE COURT: The Court would like to have further analysis on the record, relating to that question. There may be a legitimate dispute as to who the prevailing party, as such, is in this lawsuit, inasmuch as both parties were awarded some financial remuneration by the jury. The defendants are going to argue they are prevailing because they were awarded more money than the plaintiffs. The Court is convinced that there is recent case law that disputes that notion.

However, the Court believes the defendants have a much stronger case in seeking and being awarded costs, clearly, and, perhaps, legal fees, if the argument of pro se representation is effectively met, under the express language of the trust deed note. The note itself provides that if action is taken for the protection or the enforcement of the trust deed note, the party incuring those expenses is entitled to legal fees and costs if they prevail. That is the essence of the paragraph cited to the Court, is it not?

MR. SULLIVAN: It is, your Honor. May I respond to that?

THE COURT: Yes. Let's take it in reverse order.

Before addressing the question of whether or not the pro se defendants are entitled to legal fees, which, admittedly, is a more difficult matter to address, go to the costs.

MR. SULLIVAN: I will, your Honor. If the Debrys had not been entitled to any damages, themselves, it seems clear to me, as the Court has observed, that these people would have a right to costs both under Rule 54 and under the contract. However, the Debrys have been awarded damages, and have been awarded other relief, by stipulation, that relates directly to the defendants' entitlement -- entitlements under the trust deed note.

What I am talking about, your Honor, is, in very simple terms, the Cascade people were owed some money under the trust deed note for the construction of a building. In this case, they have sought to enforce that right. The Debrys, on the other hand, have sought to enforce their right to be paid by Cascade defendants for defects in that very same building.

Now, I can see a situation in which the Debrys may end up being owed more money by the defendants in this case than they owe the defendants. In other words, one of the defects in this case is the masonry defects. And Sherwin Knudsen is under an obligation, pursuant to the stipulation, to fix those masonry defects. And the masters panel that was appointed by the Court has estimated that the amount of money

necessary to pay for those masonry defects is going to be over $163,000. In addition to that, the Debrys have been awarded damages for other defects, in the amount of I think $22,000, from the Cascade defendants.

Now, if plaintiffs are owed more by Cascade people and those with whom they contracted than the Cascade people are owed by the Debrys under the contract, I don't see how they can be held to have prevailed under this contract provision. I mean, it doesn't make sense that they would be entitled to attorney's fees, even under the contract, even under the trust deed note, if, as a result of this legal action, they end up owing the Debrys, or their contractor owes the Debrys for the construction of this very building, more than they are owed by the Debrys. In other words, they have got to prevail in some net fashion in order to actuate this contract provision.

THE COURT: If the Court were to rule as follows, would they not be the prevailing party? And that is, that, pursuant to a contractual agreement, the defendants are not obligated for masonry defects, because that obligation was assumed by negotiated agreement with Tri-K and plaintiffs? Number one. And/or the defendants are the prevailing party because, even if they are obligated to the plaintiffs for masonry defects, the obligation can be satisfied with the payment of a $30,000 debt?

MR. SULLIVAN: I didn't quite understand the last part.

THE COURT: The jury awarded a judgment in behalf of the plaintiff against the defendants for $30,000. If the Court rules that, irrespective of any agreement between Tri-K and the plaintiffs relating to masonry work, the sum total of the defendants' obligation to the plaintiff, regarding masonry work, is limited to $30,000, would they still not be the prevailing party?

MR. SULLIVAN: No, they would not. Then what we have here, your Honor, is a conclusion that whoever gets the most -- whoever nets the most money is the prevailing party. And that in Utah is not the law.

THE COURT: The Court agrees in principle with you.

MR. SULLIVAN: I believe that's not the law in Utah. That's why I don't think they are entitled to recover costs. I mean, if they prevailed entirely on their contract action, with no offsets, and if the Court could conclude, therefore, that the Debrys were completely unjustified legally and factually in seeking, in effect, offsets, then they would clearly be the prevailing party. But that's not what happened here. There were offsets. As a result, there was this lawsuit, and neither party, in effect, was the prevailing party. Both parties got a portion of what they wanted.

THE COURT: Respond to a third scenario propounded

Court in error?

MR. SULLIVAN: I think the issue we are on now, I have lost that one issue, on interest, and what we are arguing about now --

THE COURT: Is the awarding of fees and costs --

MR. SULLIVAN: On prevailing parties. I am saying both parties prevailed to a certain extent. My understanding of the cases of the Utah Supreme Court is that neither party is to be awarded costs in those instances. And that's our position.

THE COURT: Anything further? The Court rules that any provision in the trust deed note that would provide the awarding of fees are inapplicable to the defendants, because they have not incurred in legal fees, set forth in affidavit form to the Court.

Regarding the costs that are referred to in the trust deed note language, the Court finds that there was no prevailing party, consistent with the jury verdict, because damages were awarded in behalf of and against each party in the lawsuit. Therefore, fees and costs are not properly assessable under the provision of the trust deed note, because of no prevailing party.

Now, is there any ambiguity regarding the ruling of the Court?

MR. DEL BARTEL: If I may. I understand that,

because the Court has ruled there is no prevailing party in the case, there is no award of costs.

THE COURT: Or fees.

MR. DEL BARTEL: However, the Court referenced the fact that we -- Cascade defendants failed to submit an affidavit of costs. Isn't it a fact that we have five days from the signing of the judgment to do that, if, in fact, the Court is going to deny on the prevailing party?

THE COURT: The Court is denying the awarding of costs and fees because there is no prevailing party. The Court is also saying that, in addition thereto, legal fees could not be awarded, because they have not been incurred. You are pro se.

MR. DEL BARTEL: We did have legal fees, though, your Honor. We had attorney fees, $27,000 worth, at the first of the case. That's what we were praying for.

THE COURT: The Court will not address that issue, having found that fees and costs are not to be awarded, because there is no prevailing party, consistent with the language of the trust deed note.

MR. SULLIVAN: I am assuming that interest -- except for the trust deed note obligation, interest runs from the date of the jury verdict on all damages.

MR. DEL BARTEL: I don't believe that's our contention -- our contention is that last August the

C E R T I F I C A T E

I, BRAD J. YOUNG, hereby certify that I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Pat B. Brian and that the foregoing is a true and correct transcription of my stenographic notes thereof.

Dated at Salt Lake City, Utah, this 5th day of May, 1991.

BRAD J. YOUNG
OFFICIAL COURT REPORTER

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1136

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT J. DEBRY and JOAN DEBRY, Plaintiffs, vs. CASCADE ENTERPRISES, et al., Defendants.	MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR ADDITUR, OR IN THE ALTERNATIVE, FOR A NEW TRIAL ON ISSUE OF DEFENDANTS' LIABILITY AND DAMAGES THEREFORE
CANADA LIFE ASSURANCE CO., Plaintiff, vs. ROBERT J. DEBRY, et al., Defendant.	Civil No. C86-553 JUDGE PAT B. BRIAN

Plaintiffs submit the following Memorandum in Support of Their Motion for Judgment Notwithstanding the Verdict, or in the alternative, for an additur, or in the alternative, for a new trial on the issues of defendants' liability and damages therefore.

6. Breach of the following warranties:

a) Occupancy;

b) Defects in workmanship and materials;

c) Warranty building built as required by Uniform Building Code.

d) Habitability;

e) Workmanship;

f) Fitness for purpose.

Those motions were based on the evidence set forth above. The motions were denied. Plaintiffs now have brought a motion for judgment notwithstanding the verdict and a motion for additur or alternatively a new trial.

The function of the rule allowing the court to enter judgment notwithstanding the jury verdict is to permit the trial court to submit the case to the jury for their determination and then, if the verdict goes adverse to the moving party, the court can, when there is more time for deliberation, re-examine and rule upon whether a jury question truly exists. Roche v. Zee, 1 Utah 2d 193, 264 P.2d 855 (1953). In passing upon a motion for judgment notwithstanding the verdict, the court is governed by the same rules as when passing upon a motion for directed verdict. Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967). A directed verdict is appropriate when the court is able

to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. Management Committee v. Greystone Pines, Inc., 652 P.2d 896 (Utah 1982). For the reasons set forth below, the plaintiff submits that reasonable minds could not differ on the uncontroverted evidence presented and that judgment in favor of the plaintiff should be entered as set forth herein below and the counterclaim of defendants dismissed.

In the alternative, plaintiffs move for an additur, or alternatively, for a new trial under Rule 59 of the Utah Rules of Civil Procedure.

ARGUMENT

POINT I

THE PUNITIVE DAMAGE AWARD CANNOT BE LEGALLY SUPPORTED. THE JURY'S VERDICT IS CONTRARY TO LAW AND JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE TO VACATE SUCH AWARD

The jury in this case awarded to defendants punitive damages in the sum of $125,000. For the reasons set forth hereinafter, said award cannot stand and must be vacated.

The basis for the awarding of punitive damages in the State of Utah is set forth by statute. Utah Code Ann. § 78-18-1(1)(a) provides:

to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. Management Committee v. Greystone Pines, Inc., 652 P.2d 896 (Utah 1982). For the reasons set forth below, the plaintiff submits that reasonable minds could not differ on the uncontroverted evidence presented and that judgment in favor of the plaintiff should be entered as set forth herein below and the counterclaim of defendants dismissed.

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The basis for the awarding of punitive damages in the State of Utah is set forth by statute. Utah Code Ann. § 78-18-1(1)(a) provides:

> Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

It is clear that only under the terms of the statute may punitive damages be awarded.

For punitive damages to be awarded under the statute, two elements are necessary under Section 1(a). First, there must be a finding by the jury that the conduct of the tortfeasor is either: (a) willful and malicious, or (b) intentionally fraudulent or manifests knowing and reckless indifference toward the rights of others. Second, there must be an award of compensatory or general damages.

It is the position of plaintiff that neither of these elements has been met, and that lack of either is sufficient to require the court to vacate the punitive damage award.

1. Damage award.

The statute, as well as case law, requires an award of general or compensatory damages to sustain a punitive damage award. The statutory requirement is consistent with the case law of Utah which has always required a general damage award in a law

case to sustain a punitive damage award. See, e.g., Maw v. Weber Basin Water Conservancy District, 20 Utah 2d 195, 436 P.2d 230 (1968); Graham v. Street, 2 Utah 2d 144, 270 P.2d 456 (1954). The rule as set forth in Graham, supra is "[T]here can be no punitive damages without compensatory damages based on the tort." 2 Utah 2d at 150. As the Graham court observed "[T]he failure to allege and prove a tort giving rise to compensatory damages vitiates the claim for punitive damage." Id.

This statement of the Graham court is based upon two well accepted legal principles. First, punitive damages cannot be awarded for breach of contract. See, e.g., Continental National Bank v. Evans, 107 Ariz. 378, 489 P.2d 15 (1971); Williams v. Speedster, Inc., 175 colo. 73, 485 P.2d 728 (1971); Modern Air Conditioning Inc. v. Cinderella Homes Inc., 226, Kan. 70, 596 P.2d 816 (1979); Purington v. Sound West, 566 P.2d 795 (Mont. 1977); Fox v. Overton, 534 P.2d 679 (Okla. 1975); Waters v. Trenckmann, 503 P.2d 1187 (Wyo. 1972). Second, without an award of damages for the tort on which the punitive damage award is based, such award cannot stand. See, e.g., Graham v. Street, supra; LaFrentz v. Gallagher, 105 Ariz. 255, 462 P.2d 804 (1969); Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974); Boise Dodge Inc. v. Clark, 92 Idaho 902, 453 P.2d 551 (1969); Dold v. Sherow, 220 Kan. 350, 552 P.2d 945 (1976);

Purington v. Sound West, supra; City of Reno v. Silver State Flying Service, Inc., 84 Nev. 170, 438 P.2d 257 (1968); Christman v. Voyer, 92 N.M. 772, 595 P.2d 410 (1979); State v. Brown, 519 P.2d 491 (Okla. 1974); Belleville v. Davis, 262 Or. 387, 498 P.2d 744 (1972).

In the present case, the jury gave only one damage award. The award was for breach of the trust deed note (a breach of contract). They then awarded $125,000 in punitive damages.

The award of $62,500 plus interest was on defendants' first cause of action in the counterclaim. No punitive damages were sought for the breach of contract action nor could they be lawfully allowed under the cases cited above.

In question 36 of the special interrogatories, the jury awarded recovery on the face amount of the Trust Deed Note plus interest. With respect to the claims of defendants to entitlement to general or compensatory damages for "costs spent after the sale" and "extras not paid for" the jury awarded $0 in each category.

These two categories were the "general" or "compensatory" damages, an award of which is an absolute prerequisite under the statute and case law before a punitive damage award may stand.

Therefore, it is manifest that under the statute and cases cited herein, the punitive damage award of $125,000 must fail.

In addition to the statutory requirement of general damages, before punitives may be awarded, the statute also requires a finding that the act for which punitive damages are awarded be either: (a) willful and malicious; (b) intentionally fraudulent; or (c) manifest a knowing and reckless indifference toward and disregard of the rights of others.

This requires two things to occur before an award can stand:

1. A finding of one of the above elements by the jury.
2. Such finding must be based upon instructions to the jury defining the said elements and informing the jury of their necessity before punitives may be awarded.

Since neither instructions nor a finding exist, the award cannot stand.

Plaintiffs herein are entitled as a matter of law to have the punitive damage award stricken.

POINT II

AS A MATTER OF LAW, DEFENDANTS DALE THURGOOD AND DEL BARTEL HAVE NO OWNERSHIP INTEREST IN THE TRUST DEED AND NOTE AND NO LEGAL RIGHT TO ATTEMPT TO FORECLOSE THE SAME. THE JURY'S VERDICT IS CONTRARY TO LAW AND JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE TO VACATE THE AWARD

The evidence in the case clearly shows that defendants Dale Thurgood and Del Bartel assigned all right, title and interest they possessed in the Trust Deed and Note for $62,500 to Utah Title (Exhibits 11,12 & 13).

Utah Code Ann. § 25-5-1 provides as follows:

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing..

To paraphrase, "no estate or interest in real property . . . shall be . . . assigned . . . otherwise than . . . in writing subscribed by the party . . . assigning . . . the same. . . ."

Therefore, by statute, the only way Thurgood and Bartel could ever again obtain an interest in the Trust Deed and Note (Exhibits 11 and 13) after having assigned away all of their

interest therein (Exhibit 12) would be by written assignment back from Utah Title.

An oral assignment is impossible under Utah Code Ann. § 25-5-1, yet this is exactly what is claimed to have occurred. The jury made no finding that the defendants owned the Trust Deed and Note.

The record in this case is devoid of any evidence to support a claim of interest of defendants in the Trust Deed and Note. By statute (25-5-1) the only method by which they could obtain any interest is a written assignment.

Therefore, as a matter of law, Utah Title owns the Trust Deed and Note and the defendants herein have no right title or interest therein and lack standing to foreclose the same.

Therefore, the court must dismiss count one of the counterclaim and vacate the jury's award thereunder, there being no evidence upon which such award can legally be based.

POINT III

UTAH CODE ANN. § 42-2-10 PRECLUDES DEFENDANTS FROM MAINTAINING THEIR COUNTERCLAIM AND JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE TO DISMISS THEIR COUNTERCLAIM

In the present case, plaintiffs assert that Utah Code Ann. § 42-2-10 precludes suit herein by the Cascade defendants on their counterclaims. The language of the statute is clear. The

testimony of Mr. Van Alstyne, the Director of the Division of Corporations and Commercial Code was clear. He stated that defendants Del Bartel, Lee Bartel and Dale Thurgood were not and had not at any previous time ever legally complied with the filing requirements of Section 42-2-5 and, therefore, the penalty provided in Section 42-2-10 was applicable.

The court ruled that as a factual matter, Cascade defendants had made a good faith attempt to comply by attempting to file even though they could not legally file under the names Cascade Construction or Cascade Enterprises.

Plaintiffs respectfully urge that such ruling is erroneous for the following reasons:

The statute makes no provision for "good faith" attempts to comply. The statute is mandatory and provides for filing an assumed name at the time one commences business (Section 42-2-5). The risk one runs if one fails to comply with Section 42-2-5 at the time one commences business is that at some future date the chosen fictitious name will not be available for use. That is the contingency which has befallen defendants herein. For six years they ignored the mandate of Section 42-2-5 and then, when faced with the penalty of Section 42-2-10, they found themselves unable to comply legally as the names were registered to another.

The crucial question involved is whether this court has the power to judicially create a "good faith" exception to the filing requirement of Section 42-2-5 and the ensuing penalty for non-compliance found in Section 42-2-10.

It is a clearly accepted principle of law that a court has no power to enlarge the scope of a statute nor to amend it by judicial interpretation. Schroder v. Kansas State Highway Commission, 199 Kan. 175, 428 P.2d 814 (1967); Anderson v. City of Seattle, 78 Wash.2d 201, 471 P.2d 87 (1970). As observed by the Utah Court of Appeals, "The court's primary responsibility in construing legislation is to give effect to the intent of the legislature." State v. Jones, 735 P.2d 399, 402 (Utah App. 1987). See, Millett v. Clark Clinic Corporation, 609 P.2d 934, 936 (Utah 1980); Christensen v. Industrial Commission, 642 P.2d 755 (Utah 1982). The court's primary responsibility is to give effect to the legislature's intent. American Coal Co. v. Sandstrom, 689 P.2d 1, 3 (Utah 1984). See, Murray City v. Hall, 663 P.2d 1314 (Utah 1983); State v. Helm, 563 P.2d 794 (Utah 1977).

The legislative intent of Section 42-2-5 et seq. is clear. There is no equivocation. The mandate is "File your dba before you do business or run the risk of not being able to use

the courts of this state until you can legally comply with Section 42-2-5."

Nowhere is there any statutory language regarding excuses for not filing or relating to good faith attempts to comply. The language is clear. Comply or you are barred from using state courts.

There is no evidence in the record showing legal compliance with Section 42-2-5. The testimony of Mr. Van Alstyne is unequivocal that there was no compliance by the defendants herein who did not legally file under the name Cascade Construction Company and Cascade Enterprises. Therefore, the only avenue open to the court is to follow the legislative mandate of Section 42-2-10 and dismiss the counterclaims. Defendants must bear the burden of their failure to comply with the statutory mandate of Section 42-2-5.

POINT IV

THE DAMAGE AWARD FOR BREACH OF WARRANT AND NEGLIGENCE IS INSUFFICIENT UNDER THE EVIDENCE AND THIS COURT SHOULD GRANT AN APPROPRIATE ADDITUR OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES

Rule 59(a)(5) of the Utah Rules of Civil Procedure provides, in pertinent part, as follows:

> (a) [A] new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes. . .

> (5) *Excessive or inadequate damages*, appearing to have been given under the influence or passion or prejudice.

While granting a new trial is one remedy for inadequate damages, the Utah Supreme Court has held that implicit within the authority of the Court to grant a new trial is the power to grant an additur to the verdict. In Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826, 828 (1958), the Court stated:

> There is implicit within the authority of the court to grant a new trial on the statutory ground of "excessive or inadequate damages" the power to order a new trial conditionally; that is, to order that a new trial be granted unless the party adversely affected by the order agrees to a remittitur or an additur of the damages to an amount within proper limits as viewed by the court.

The Court explained that this process of modifying the verdict to bring it within the evidence is reserved for situations where the verdict is outside the limits of what appears justifiable under the evidence to such an extent that the verdict should not be permitted to stand. Id. at 829.

In Paul v. Kirkendall, 1 Utah 2d 1, 261 P.2d 670, 671 (1953), the Utah Supreme Court explained the standard in determining whether to grant an additur or new trial as follows:

> If inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the court as to the law applicable to the case as to satisfy the court that the verdict was

> rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interest of justice and grant a new trial.

The Court further clarified this standard in Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (Utah) by stating that an additur or new trial is warranted where "it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence." Id. at 354.

The plaintiff acknowledges that it is generally the prerogative of the jury to make the determination of damages. Jensen v. Ekins, 575 P.2d 179 (Utah 1978). Where, however, the standards listed above have been satisfied, the trial court can and should step in and exercise its prerogative to bring the verdict within the limits of the evidence. Such is the case here.

This is not a case where the plaintiff is dissatisfied with the amount of a general verdict and requests an additur. This is a case where the jury rendered a special verdict. The damage award of that verdict is inconsistent with the special verdicts rendered by that same jury.

The jury found the defendants breached the implied warranty that the building would be built as required by the

Uniform Building Code (Question No. 4(a)). The court found as a matter of law, the masonry way negligently installed. The proper measure of damages is cost of repair of the code defects.

Exhibits 205, 206, 207 and 208 establish code violations needing repair. Defendants offered no proof at trial that any specific code violations set forth in Exhibits 205, 206, 207 or 208 had been repaired. While there was evidence that "repairs" were made, no evidence was produced to show what repairs were made, by whom, or that the repairs corrected any specific defect.

Bill Karren testified and gave a bid to fix the said code defects. The defects needing repairs were categorized as follows:

a) Masonry;

b) Roof and floor;

c) Trusses;

d) Heating and plumbing;

e) Electrical;

f) Parking lot;

g) West stair;

h) architectural; and

i) miscellaneous.

Bill Karren testified to the cost of repairs in each category. Defendants offered no contradictory or rebuttal testimony to show either:

a) The repairs could be competently completed at a lesser charge; or

b) Any specific repair was not needed.

Therefore, the only competent evidence before the jury on cost of repair was that of Mr. Karren.

There is no basis in the evidence for the amounts listed by the jury in answer to Question No. 18. Nor is there evidence in the record from which the said amounts listed by the jury could have been arrived at by mathematical calculation. It is clear that the numbers are random. It is also clear, however, that the jury found plaintiffs were entitled to recover the costs of repairs for code defects.

When a verdict is supported by competent evidence, the court usually leaves it as it is. When, however, there is no evidence to support an award, the court may take action to conform the award to the evidence. See, Weber Basin Water Conservancy District v. Skeen, supra.

An additur is a proper method of treating a situation where inadequate damages are awarded. See, Bodon v. Suhrmann, supra.

In the present case, the Masters' panel found the cost of masonry repairs to be $161,885. Mr. Bill Karren testified the cost of repair would be $161,885. No contrary evidence was admitted at trial. As a minimum, the masonry repair costs should be increased from $30,800 to $161,885.

Secondly, electrical repairs were $10,648 according to Bill Karren. No contrary evidence was admitted. The electrical award should be increased from $0 to $10,648.

Additionally, the following awards should be increased since no contrary evidence was produced at trial.

Floor and Roof	$31,514
Trusses	10,549
TOTAL	$42,063

POINT V

IN THE ALTERNATIVE, PLAINTIFFS SHOULD HAVE A NEW TRIAL ON NEGLIGENCE, WARRANTY AND ON DAMAGES FOR NEGLIGENCE AND BREACH OF WARRANTY

The court ruled at trial and instructed the jury that defendants were negligent in constructing the building, yet the jury answered Question No. 1 that defendants were not negligent in constructing the building.

The jury answered question no. 4 "yes" thereby finding, of necessity, that the building was constructed with code

violations (incliding of necessity the masonry defects). Having this ruled, and given the court's instruction that defendants were negligent in construction of the masonry, there is no logical basis for finding that the workmanship warranties were not breached. Also, there is no basis for the "no" answer to question no. 1.

The court having ruled on the masonry defects (as a result of defendants stipulation to be bound thereby) there is no basis for finding there was no breach of warranties of occupancy and habitability.

The only way the jury could have answered "no", as it did, on question nos. 1, 4(b) and 4(e) would be to totally ignore the court's instructions.

Failure of the jury to follow the instructions of the court on the law is sufficient basis for granting a new trial. Efco Distributing, Inc. v. Perrin, 17 Utah 2d 375, 412 P.2d 615 (1966); Matter of Acquisition of Property by Eminant Domain, 236 Kan. 417, 690 P.2d 1375 (1984); Cole v. Gerhart, 5 Ariz. App. 24, 423 P.2d 100 (1967); Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978); Salvail v. Great Northern Ry Co., 473 P.2d 549 (Mont. 1970); Price v. Sinnot, 85 Nev. 600, 460 P.2d 837 (1969) affd. 90 Nev. 5, 517 P.2d 1006 (1974).

It has also been held that where the interrogatory answers are inconsistent, a new trial is justified. Van Cleve v. Betts, 16 Wash. App. 748, 559 P.2d 1006 (1977).

A new trial is also proper where there is insufficient evidence to support the jury verdict. Efco Distributing, Inc. v. Perrin, supra; Villegas v. Bryson, 16 Ariz. App. 456, 494 P.2d 61 (1972).

The whole purpose of a new trial is to correct errors made at the trial. In the present case, the jury made obvious errors in not following the court's instruction on negligence and warranty and in not answering Questions No. 2 & 3. There are obvious errors and failures to follow the evidence in the jury's answers to Question No. 18.

As the court observed in Efco Distributing, Inc. v. Perrin, supra:

> If is clearly appears that there has been a miscarriage of justice because the jury has refused to accept credible, uncontradicted evidence where there is no rational basis for rejecting it, or it is plain to be seen that the jury has acted under a misconception of proven facts, or has misapplied or disregarded the law, or where it appears that the verdict was the result of passion and prejudice, it is both the prerogative and the duty of the court to set aside the verdict and grant a new trial.

In the present case, the findings of the jury do not follow the evidence. In the event the court does not grant the

notwithstanding the verdict plaintiffs' motion for judgment and the additur motion, a new trial should be granted on defendants' liability and on the damages resulting therefrom.

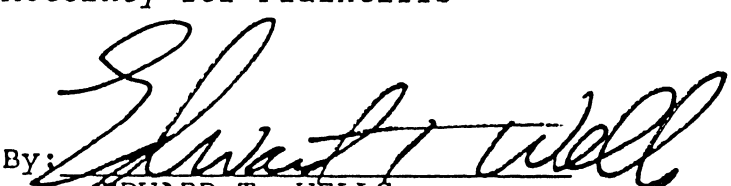
CONCLUSION

The jury's answers to the special verdict are not justified under the evidence in the case and should not be allowed to stand. This is especially true of the failure to rule on the proximate cause issue on negligence and damages therefore.

The evidence at trial argues conclusively for a judgment notwithstanding the verdict and an additur as requested herein, or in the alternative, a new trial for plaintiffs as to the negligence issues and damages on negligence and warranty.

DATED this 29th day of June, 1990.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiffs

By: 
EDWARD T. WELLS

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR ADDITUR, OR IN THE ALTERNATIVE, FOR A NEW TRIAL ON ISSUES OF DEFENDANTS' LIABILITY AND DAMAGES THEREFORE, (DeBry v. Cascade, et al.) was mailed, postage prepaid, on the 3 day of ~~June~~ May, 1990, to the following:

Dale Thurgood
190 South 350 West
Bountiful, UT 84010

Del Bartel
9264 South 3400 West
West Jordan, UT 84088

Lee Allen Bartel
110 Merrimac Court
Vallejo, CA 94589

Bradley L. Hart

SP3-730\jn

Def
1175

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4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT J. DEBRY and JOAN DEBRY, Plaintiffs, vs. CASCADE ENTERPRISES, et al., Defendants.	SUBSTITUTE MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR ADDITUR, OR IN THE ALTERNATIVE, FOR A NEW TRIAL ON ISSUE OF DEFENDANTS' LIABILITY AND DAMAGES THEREFORE
CANADA LIFE ASSURANCE CO., Plaintiff, vs. ROBERT J. DEBRY, et al., Defendant.	Civil No. C86-553 JUDGE PAT B. BRIAN

Pursuant to the court's order allowing re-submission of authority upon completion of the transcript, plaintiffs submit the following Substitute Memorandum in Support of Their Motion for Judgment Notwithstanding the Verdict, or in the alternative, for an additur, or in the alternative, for a new trial on the issues of defendants' liability and damages therefore.

MATERIAL FACTS

At trial, the following facts were established by undisputed testimony.

1. Cascade Enterprises has never lawfully filed as a partnership pursuant to the requirements of Utah Code Ann. §42-2-5. (See, Exhibits 59 & 60; Tr. pp. 285, 301, 712, 1512, 1517, 1252.)[1]

2. Cascade Construction Company has never lawfully filed as a partnership either under the name Cascade Construction or Cascade Construction Company pursuant to the requirements of Utah Code Ann. § 42-2-5. Id.

3. The Trust Deed and Trust Deed Note (Exhibit 11 & 13) from Robert DeBry and Joan DeBry to defendants Del Bartel and Dale Thurgood were assigned in writing to Utah Title & Abstract and the assignment was recorded in the Salt Lake County recorder's office. (See, Exhibit 12; Tr. pp. 622, 1608-10, 1615, 1617.)

4. No evidence was produced that Utah Title & Abstract Co. has ever given a written assignment of Exhibit 11 and 13 to defendants Thurgood and Bartel and defendants testified they have never received back an assignment of the Trust Deed and Note. (Tr. p. 1617.)

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[1]Those portions of the transcript cited herein are attached hereto as an appendix.

5. The Masters' panel reported masonry defects in the building at 4252 South 700 East and the court ruled defendants were negligent in constructing the masonry. (See, Tr. 1647-48.)

6. Defendants produced no evidence to refute the findings of the Masters' panel. Id.

7. Exhibit 207 lists electrical defects in the building. These defects were admitted by the electrician in requests for admission. No evidence was offered to dispute any of the said defective code violations. (See, Tr. pp. 1670-73, 740-41.)

8. Bill Karren testified that the cost of repair of the electrical defects was $10,648. No testimony was received to dispute this amount. (Tr. p. 844, ln. 2-6.)

9. Bill Karen testified the cost of masonry repairs was $161,885. No testimony to the contrary was received. (Tr. p. 842, ln 22.)

10. The jury found that defendants breached an implied warranty to construct the building as required by the Uniform Building Code. (Special Interrogatory No. 4.)

11. The jury awarded $5,000 for past repairs to the building. (Question No. 5.)

12. The jury awarded $47,615 for repairs of building code violations. (Question No. 6.)

13. At trial, the unrefuted testimony was that code violation repairs (masonry, roof and floor, trusses, electrical) totalled $214,592. (Tr. pp. 842-45.)

14. No testimony was offered by defendants to show:

a) The cost of repair was not as testified by Bill Karren.

b) Any of the repairs testified to by Mr. Karren to meet code were not needed.

15. The repair costs of heating and plumbing ($24,200), west stair ($1,470), architectural ($37,268) and miscellaneous ($11,816) contained code violation repairs, but such code violations were not delineated from other repairs. (Tr. pp. 842-45.)

16. Defendants offered no evidence to refute the cost of moving to and from and leasing alternate office space as being the sum of $351,604.20. (See, Exhibit 245; Tr. pp. 693-98.)

17. Defendants signed the escrow and non-merger agreement on December 10. (Exhibit 6; Tr. pp. 1118-19.)

18. The escrow and non-merger agreement (Ex. 6) was not prepared as part of the closing, but as a separate contract and was entered into on December 10. (Tr. pp. 1123-24.)

19. The closing would not have occurred without the said contract (Ex. 6). Id.

20. The contract was acknowledged by Thurgood and Bartel on December 13, Tr. p. 785 ln. 13 (testimony of Dale Thurgood); deposition of Wendy Harris (notary); Exhibit 6.

21. Exhibit 12, the assignment of Trust Deed and Note was signed by both defendants and assigned all right, title and interest they had in the Trust Deed and Trust Deed Note (Ex. 11, 13) to Utah Abstract & Title Co. (See, Tr. pp. 622, 1609.)

22. Utah Title mailed the Trust Deed back to Thurgood (Tr. p. 1615) but defendants do not have any documentation that the note or the trust deed were ever assigned back to them. (Tr. pp. 1609-10.)

23. Indeed, defendants do not have and did not produce the original Trust Deed Note which remains with Utah Title (see, Affidavit of Bradley C. Harr) and defendants have admitted that Utah Title has never assigned back either the Trust Deed or the Trust Deed Note. (Tr. p. 1617, ln. 7-11.)

24. The court ruled that warranties existed as to occupancy, Uniform Building Code, workmanship and materials, habitability and fitness for purpose. (Tr. pp. 1640-41.)

25. Building permits issued by the county are always in writing and there is no such thing as an oral building permit. (Tr. p. 31.)

26. Exhibit 103 issued to defendants is a footings and foundation only permit and cannot legally be used to build other than footings and foundations. (Tr. p. 37.)

27. There was no full building permit issued prior to 1987. (Tr. pp. 56, 61.)

28. Defendants constructed the building with a footings and foundation only permit. (Tr. pp. 131, 149, 183.)

29. The only written permit defendants ever got from the county was Exhibit 103. (Tr. pp. 587, 983-84, 1090-91, 1219.)

30. Defendants admitted they have no evidence to show other than a footings and foundation permit. (Tr. p. 626.)

31. The original file of Salt Lake County relating to Exhibit 103 and the original application for a building permit in 1984 has never been lost. (Tr. pp. 100, 174.)

32. Exhibit 104 was the only set of plans submitted to the county prior to 1987. The said plans were not complete and were only approved for footings and foundations. (Tr. pp. 38, 165, 570.)

33. A stop work order on the building was issued (Exhibit 100).

34. The county has no record of lifting the stop work order prior to 1987. (Tr. pp. 49, 148.)

35. The stop work order would not be lifted until the bounced check was made good. (Tr. p. 171.)

36. Defendants did not make the bounced check good until 1987. (Tr. p. 1076-78.)

37. There is no evidence the stop work order was lifted prior to 1987. (Tr. pp. 49, 1106.)

38. Doing inspection when there is no proper permit does not create a permit. (Tr. pp. 57, 104, 108, 167.)

39. The fact the county may make on inspection and pass the building does not mean there are no defects or that existing defects have been corrected. (Tr. pp. 57, 112, 142, 167.)

40. Salt Lake County ordered plaintiffs to vacate the building because of structural defects affecting the safety of the building. (Tr. pp. 63-67, 92, 109-10.)

41. DeBry vacated the building because of the county order. Id. (see, Tr. p. 693.)

42. There was no evidence produced to show DeBrys had any other reason for vacating the building.

43. Plaintiffs could not legally make the repairs to the building without a permit. (Tr. p. 61.)

44. It was defendants' responsibility to correct the defects. (Tr. p. 61.)

45. Defendants acknowledged they warranted they would

meet code requirements. (Tr. p. 303.)

46. The jury found that repair of code violations to the west stair would cost $625. (Question No. 18(g).)

47. The jury found that repair of code violations in the architectural category would cost $7,000. (Question No. 18(h).)

48. The jury found that repair of code violations in the miscellaneous category would cost $10,000. (Question No. 18(i).)

49. The jury found that defendants suffered no general or special damages. (Question No. 36.)

50. The only damages awarded to defendants ~~were for~~ breach of contract on the Trust Deed Note. (Question No. 36.)

51. The jury awarded $125,000 punitive damages. (Question No. 36.)

52. Defendants offered no specific evidence of any claimed defect cited as defective by plaintiffs resulting from work of subcontractors working for DeBry.

53. Defendants offered no evidence of any specific work done to repair existing defects in the building.

54. Exhibits 205, 206, 207 and 208 recite specific defects and code violations needing repair.

55. Defendants offered no evidence to show that any code defects listed in Exhibit 205, 206, 207 and 208 had been repaired by them or their subcontractors.

Those motions were based on the evidence at trial as highlighted above. The motions were denied. Plaintiffs now have brought a motion for judgment notwithstanding the verdict and a motion for additur or alternatively a new trial.

The function of the rule allowing the court to enter judgment notwithstanding the jury verdict is to permit the trial court to submit the case to the jury for their determination and then, if the verdict goes adverse to the moving party, the court can, when there is more time for deliberation, re-examine and rule upon whether a jury question truly exists. Roche v. Zee, 1 Utah 2d 193, 264 P.2d 855 (1953). In passing upon a motion for judgment notwithstanding the verdict, the court is governed by the same rules as when passing upon a motion for directed verdict. Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967). A directed verdict is appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. Management Committee v. Greystone Pines, Inc., 652 P.2d 896 (Utah 1982). For the reasons set forth below, the plaintiff submits that reasonable minds could not differ on the uncontroverted evidence presented and that judgment in favor of the plaintiff should be entered as set forth herein below and the counterclaim of defendants dismissed.

In the alternative, plaintiffs move for an additur, or alternatively, for a new trial under Rule 59 of the Utah Rules of Civil Procedure.

ARGUMENT

POINT I

THE PUNITIVE DAMAGE AWARD CANNOT BE LEGALLY SUPPORTED. THE JURY'S VERDICT IS CONTRARY TO LAW AND JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE TO VACATE SUCH AWARD

The jury in this case awarded to defendants punitive damages in the sum of $125,000. For the reasons set forth hereinafter, said award cannot stand and must be vacated.

The basis for the awarding of punitive damages in the State of Utah is set forth in case law and by statute. Utah Code Ann. § 78-18-1(1)(a) provides:

> Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

It is clear that only under the rules set forth in case law, or under the terms of the statute may punitive damages be awarded.

For punitive damages to be awarded under the statute, two elements are necessary under Section 1(a). First, there must be a

finding by the jury that the conduct of the tortfeasor is either: (a) willful and malicious, or (b) intentionally fraudulent or manifests knowing and reckless indifference toward the rights of others. Second, there must be an award of compensatory or general damages.

It is the position of plaintiff that neither of these elements has been met, and that lack of either is sufficient to require the court to vacate the punitive damage award. Under the case law, the same general rules applies.

1. Damage award.

The statute, as well as case law, requires an award of general or compensatory damages to sustain a punitive damage award. The statutory requirement is consistent with the case law of Utah which has always required a general damage award in a law case to sustain a punitive damage award. See, e.g., Maw v. Weber Basin Water Conservancy District, 20 Utah 2d 195, 436 P.2d 230 (1968); Graham v. Street, 2 Utah 2d 144, 270 P.2d 456 (1954).

The rule as set forth in Graham, supra is "[T]here can be no punitive damages without compensatory damages based on the tort." 2 Utah 2d at 150. As the Graham court observed "[T]he failure to allege and prove a tort giving rise to compensatory damages vitiates the claim for punitive damage." Id.

This statement of the Graham court is based upon two well accepted legal principles. First, punitive damages cannot be awarded for breach of contract. See, e.g., Continental National Bank v. Evans, 107 Ariz. 378, 489 P.2d 15 (1971); Williams v. Speedster, Inc., 175 colo. 73, 485 P.2d 728 (1971); Modern Air Conditioning Inc. v. Cinderella Homes Inc., 226, Kan. 70, 596 P.2d 816 (1979); Purington v. Sound West, 566 P.2d 795 (Mont. 1977); Fox v. Overton, 534 P.2d 679 (Okla. 1975); Waters v. Trenckmann, 503 P.2d 1187 (Wyo. 1972). Second, without an award of damages for the tort on which the punitive damage award is based, such award cannot stand. See, e.g., Graham v. Street, supra; LaFrentz v. Gallagher, 105 Ariz. 255, 462 P.2d 804 (1969); Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974); Boise Dodge Inc. v. Clark, 92 Idaho 902, 453 P.2d 551 (1969); Dold v. Sherow, 220 Kan. 350, 552 P.2d 945 (1976);
Purington v. Sound West, supra; City of Reno v. Silver State Flying Service, Inc., 84 Nev. 170, 438 P.2d 257 (1968); Christman v. Voyer, 92 N.M. 772, 595 P.2d 410 (1979); State v. Brown, 519 P.2d 491 (Okla. 1974); Belleville v. Davis, 262 Or. 387, 498 P.2d 744 (1972).

In the present case, the jury gave only one damage award. The award was for breach of the Trust Deed Note (a breach of contract). They then awarded $125,000 in punitive damages.

The award of $62,500 plus interest was on defendants' first cause of action in the counterclaim. No punitive damages were sought for the breach of contract action nor could they be lawfully allowed under the cases cited above.

In question 36 of the special interrogatories, the jury awarded recovery on the face amount of the Trust Deed Note plus interest. With respect to the claims of defendants to entitlement to general or compensatory damages for "costs spent after the sale" and "extras not paid for" the jury awarded $0 in each category.

These two categories were the "general" or "compensatory" damages, an award of which is an absolute prerequisite under the statute and case law before a punitive damage award may stand.

Therefore, it is manifest that under the statute and cases cited herein, the punitive damage award of $125,000 must fail.

In addition to the statutory and case law requirement of general damages, before punitives may be awarded, the statute also requires a finding that the act for which punitive damages are awarded be either: (a) willful and malicious; (b) intentionally fraudulent; or (c) manifest a knowing and reckless indifference toward and disregard of the rights of others.

This requires two things to occur before an award can stand:

1. A finding of one of the above elements by the jury.

2. Such finding must be based upon instructions to the jury defining the said elements and informing the jury of their necessity before punitives may be awarded.

Since neither instructions nor a finding exist, the award cannot stand.

Plaintiffs herein are entitled as a matter of law to have the punitive damage award stricken.

POINT II

AS A MATTER OF LAW, DEFENDANTS DALE THURGOOD AND DEL BARTEL HAVE NO OWNERSHIP INTEREST IN THE TRUST DEED AND NOTE AND NO LEGAL RIGHT TO ATTEMPT TO FORECLOSE THE SAME. THE JURY'S VERDICT IS CONTRARY TO LAW AND JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE TO VACATE THE AWARD

The evidence in the case clearly shows that defendants Dale Thurgood and Del Bartel assigned all right, title and interest they possessed in the Trust Deed and Note for $62,500 to Utah Title (Exhibits 11,12 & 13; Tr. pp. 622,1608-10, 1615, 1617.)

Utah Code Ann. § 25-5-1 provides as follows:

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating,

> granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

To paraphrase, "no estate or interest in real property . . . shall be . . . assigned . . . otherwise than . . . in writing subscribed by the party . . . assigning . . . the same. . . ."

Therefore, by statute, the only way Thurgood and Bartel could ever again obtain an interest in the Trust Deed and Note (Exhibits 11 and 13) after having assigned away all of their interest therein (Exhibit 12) would be by written assignment back from Utah Title. Defendants testified they never received back such an assignment. (Tr. p. 1609-10.)

An oral assignment is impossible under Utah Code Ann. § 25-5-1. The jury did not and could not, on the evidence, make a finding that the defendants owned the Trust Deed and Note.

The record in this case is devoid of any evidence to support a claim of interest of defendants in the Trust Deed Note. By statute (25-5-1) the only method by which they could obtain any interest is a written assignment. Defendants testified the trust deed had been sent back to them (Tr. p. 1615) but they never received back the note upon which their claim is based. (See, Affidavit of Bradley C. Harr.) (Original note still held by Utah Title.)

Therefore, as a matter of law, Utah Title owns the Trust Deed and Note and the defendants herein have no right title or interest therein and lack standing to foreclose the same. (See, Affidavit of Robert D. Schmidt.)

The court's denial of the plaintiffs' motion was based upon the erroneous assumption there was testimony that the note and trust deed had been assigned back to defendants. (See, Tr. p. 1635.) This is not true. Thurgood testified there had been no assignment back. (Tr. p. 1609-10.) The court's ruling, having been based upon a misunderstanding of the testimony, should now be reversed.

Therefore, the court should dismiss count one of the counterclaim and vacate the jury's award thereunder, there being no evidence upon which such award can legally be based.

POINT III

UTAH CODE ANN. § 42-2-10 PRECLUDES DEFENDANTS FROM MAINTAINING THEIR COUNTERCLAIM AND JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE TO DISMISS THEIR COUNTERCLAIM

In the present case, plaintiffs assert that Utah Code Ann. § 42-2-10 precludes suit herein by the Cascade defendants on their counterclaims. The language of the statute is clear. The testimony of Mr. Van Alstyne, the Director of the Division of Corporations and Commercial Code was clear. He stated that

defendants Del Bartel, Lee Bartel and Dale Thurgood were not and had not at any previous time ever legally complied with the filing requirements of Section 42-2-5 and, therefore, the penalty provided in Section 42-2-10 was applicable.

The court ruled that as a factual matter, Cascade defendants had made a good faith attempt to comply by attempting to file even though they could not legally file under the names Cascade Construction or Cascade Enterprises.

The stated basis for the court's ruling was good faith compliance by defendants. However, it can hardly be considered good faith compliance to not comply for over five years and then rush to file after a motion to dismiss has been filed based upon the previous conduct of ignoring the requirement. If the defendants were acting in good faith, they would have filed when they went into business and not waited until June 14, 1990 after the motion to dismiss was submitted to the court. Defendants admitted that when they filed they were told it would take 48-72 hours to clear the name. (Tr. p. 1255.) This period is to allow the state to make sure the name is not already owned by someone else. Having been so informed, they cannot claim in good faith they relied upon the filing or were damaged when it was determined they could not legally use the names filed for which had been legally registered to another.

Plaintiffs respectfully urge that such ruling is erroneous for the following reasons:

The statute makes no provision for "good faith" attempts to comply. There is no case law to support such an exception. The statute is mandatory and provides for filing an assumed name at the time one commences business (Section 42-2-5). (Emphasis added.) The risk one runs if one fails to comply with Section 42-2-5 at the time one commences business is that at some future date the chosen fictitious name will not be available for use. (The event which occurred in this case.) That is the contingency which has befallen defendants herein. For six years they ignored the mandate of Section 42-2-5 and then, when faced with the penalty of Section 42-2-10, they found themselves unable to comply legally as the names were registered to another.

The crucial question involved is whether this court has the power to judicially create a "good faith" exception to the filing requirement of Section 42-2-5 and the ensuing penalty for non-compliance found in Section 42-2-10.

It is a clearly accepted principle of law that a court has no power to enlarge the scope of a statute nor to amend it by judicial interpretation. Schroder v. Kansas State Highway Commission, 199 Kan. 175, 428 P.2d 814 (1967); Anderson v. City of Seattle, 78 Wash.2d 201, 471 P.2d 87 (1970). As observed by the

Utah Court of Appeals, "The court's primary responsibility in construing legislation is to give effect to the intent of the legislature." State v. Jones, 735 P.2d 399, 402 (Utah App. 1987). See, Millett v. Clark Clinic Corporation, 609 P.2d 934, 936 (Utah 1980); Christensen v. Industrial Commission, 642 P.2d 755 (Utah 1982). The court's primary responsibility is to give effect to the legislature's intent. American Coal Co. v. Sandstrom, 689 P.2d 1, 3 (Utah 1984). See, Murray City v. Hall, 663 P.2d 1314 (Utah 1983); State v. Helm, 563 P.2d 794 (Utah 1977).

The legislative intent of Section 42-2-5 et seq. is clear. There is no equivocation. The mandate is "File your dba before you do business or run the risk of not being able to use the courts of this state until you can legally comply with Section 42-2-5." If through negligence or inadvertence there is no compliance, no suit can be maintained. There is no basis for being allowed to sue merely because you tried.

Nowhere is there any statutory language regarding excuses for not filing or relating to good faith attempts to comply. The language is clear. Comply or you are barred from using state courts.

There is no evidence in the record showing legal compliance with Section 42-2-5. The testimony of Mr. Van Alstyne is unequivocal that there was no compliance by the defendants

herein with the provision of the statute and that defendants did not legally file under the name Cascade Construction Company or Cascade Enterprises. (See, Tr. pp. 1512, 1517.) Therefore, the only avenue open to the court is to follow the legislative mandate of Section 42-2-10 and dismiss the counterclaims. Defendants must bear the burden of their longstanding failure to comply with the statutory mandate of Section 42-2-5.

POINT IV

THE DAMAGE AWARD FOR BREACH OF WARRANTY AND NEGLIGENCE IS INSUFFICIENT UNDER THE EVIDENCE AND THIS COURT SHOULD GRANT AN APPROPRIATE ADDITUR OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES

Rule 59(a)(5) of the Utah Rules of Civil Procedure provides, in pertinent part, as follows:

> (a) [A] new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes. . .
>
> > (5) Excessive or inadequate damages, appearing to have been given under the influence or passion or prejudice.

While granting a new trial is one remedy for inadequate damages, the Utah Supreme Court has held that implicit within the authority of the Court to grant a new trial is the power to grant an additur to the verdict. In Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826, 828 (1958), the Court stated:

> There is implicit within the authority of the court to grant a new trial on the statutory ground of "excessive or inadequate damages" the power to order a new trial conditionally; that is, to order that a new trial be granted unless the party adversely affected by the order agrees to a remittitur or an additur of the damages to an amount within proper limits as viewed by the court.

The Court explained that this process of modifying the verdict to bring it within the evidence is reserved for situations where the verdict is outside the limits of what appears justifiable under the evidence to such an extent that the verdict should not be permitted to stand. Id. at 829.

In Paul v. Kirkendall, 1 Utah 2d 1, 261 P.2d 670, 671 (1953), the Utah Supreme Court explained the standard in determining whether to grant an additur or new trial as follows:

> If inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the court as to the law applicable to the case as to satisfy the court that the verdict was rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interest of justice and grant a new trial.

The Court further clarified this standard in Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (Utah) by stating that an additur or new trial is warranted where "it seems clear that the jury has misapplied or failed to take into account proven facts; or

misunderstood or disregarded the law; or made findings clearly against the weight of the evidence." Id. at 354.

The plaintiff acknowledges that it is generally the prerogative of the jury to make the determination of damages. Jensen v. Ekins, 575 P.2d 179 (Utah 1978). Where, however, the standards listed above have been satisfied, the trial court can and should step in and exercise its prerogative to bring the verdict within the limits of the evidence. Such is the case here.

This is not a case where the plaintiff is dissatisfied with the amount of a general verdict and requests an additur. This is a case where the jury rendered a special verdict. The damage award of that verdict is inconsistent with the special verdicts rendered by that same jury.

The jury found the defendants breached the implied warranty that the building would be built as required by the Uniform Building Code (Question No. 4(a)). The court found as a matter of law, the masonry was negligently installed. The proper measure of damages is cost of repair of the code defects and recovery for all damages proximately caused by the defective construction.

Exhibits 205, 206, 207 and 208 and the master's report establish code violations needing repair. Defendants offered no proof at trial that any specific code violations set forth in

Exhibits 205, 206, 207 or 208 had been repaired and the defects in the master's report were extant. While there was evidence that some "repairs" had been made, no evidence was produced to show what repairs were made, by whom, or that the repairs corrected any specific defect.

Bill Karren testified and gave a bid to fix the existing code defects. The defects needing repairs were categorized as follows:

a) Masonry;

b) Roof and floor;

c) Trusses;

d) Heating and plumbing;

e) Electrical;

f) Parking lot;

g) West stair;

h) architectural; and

i) miscellaneous.

Bill Karren testified to the cost of repairs in each category. (Tr. pp. 842-845.) Defendants offered no contradictory or rebuttal testimony to show either:

a) The repairs could actually be competently completed at a lesser charge; or

b) Any specific repair was not needed.

Therefore, the only competent evidence before the jury on cost of repair was that of Mr. Karren.

Salt Lake County ordered plaintiffs to vacate the building because of structural defects affecting the safety of the building. (Tr. pp. 63-67, 92, 109-10.) Plaintiffs vacated the building because of the court order. (Tr. p. 693.) No evidence was produced that there was any other reason plaintiffs vacated the building. The costs to DeBry of vacating the building and renting alternate space was $351,604.20. (Tr. p. 6981; see Exhibit 245.) Defendants offered no evidence to dispute the said costs nor was evidence offered to dispute the fact that the structural defects shown by the master's report created the safety problems. Carl Eriksson testified the masonry was one of the reasons for the eviction. (Tr. p. 66.) Absent the structural problems shown by the master's report, eviction would not have been pursued. (Tr. p. 67.) No evidence was adduced to refute the testimony of Carl Eriksson that the masonry problems (structural problems) were responsible for the eviction. Therefore, there is no competent evidence from which the jury could conclude other than the structural problems caused by the defective masonry caused the eviction of plaintiffs from the building and the resultant damages of $351,604.20.

There is no basis in the evidence for the amounts listed by the jury in answer to Question No. 18. Nor is there evidence in the record from which the said amounts listed by the jury could have been arrived at by mathematical calculation. It is clear that the numbers are random. It is also clear, however, that the jury found plaintiffs were entitled to recover costs of repairs for code defects.

In Call v. Manti City Corporation, 137 Utah Adv. Rep. 30 (1990), the court was presented with a situation similar to the case at bar. The jury awarded damages in an amount significantly less than that testified to by plaintiff's expert, and which amount was not rebutted by other competent evidence. In handling the problem, the Court of Appeals stated:

> It is true that Call's evidence regarding damages was not entirely uniform. However, the evidence clearly established general damages in an amount for exceeding what the jury awarded. Id. at 32.

Testimony was received at trial as to a high and a low on what the damages for loss of profits could be. Call's argument was that the jury could not award less than the minimum amount of damage shown by competent evidence at trial and that the trial court had erred in not directing a verdict for at least the minimum damage shown by the evidence. The appeals court agreed and stated:

While plausible views of the evidence might have led to fixing a damage award at certain other levels within this broad range, no evidence of record, nor any disciplined view of the evidence of record, would support an award outside this range. Call made timely motions for a directed verdict, and for judgment notwithstanding the verdict, in the amount shown by the most conservative view of the evidence, $56,377.60. On appeal, although it would settle for a new trial, Call principally argues the court erred, given the lack of any contrary evidence, in not directing a verdict or judgment in this minimal amount and that we should remand with instructions to do so.

A trial court's refusal to direct a verdict will not be sustained when, viewing the evidence in the light most favorable to the party who resisted the motion, reasonable minds would necessarily accept the evidence relied on by the moving party. See, e.g., White v. Fox, 665 P.2d 1297, 1300 (Utah 1983). Similarly, a refusal to enter a judgment notwithstanding the verdict will be reversed when the part so moving is entitled to the judgment requested as a matter of law. See, e.g., Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

In this case, while reasonable minds could differ on whether Call was entitled to more, the evidence established it was clearly entitled to judgment in at least the amount of $56,377.60. Upon proper motions by Call, the court erred in not directing a verdict or granting judgment in that amount. Accordingly, we reverse the judgment which was entered on the jury's verdict and remand with instructions to enter judgment in the principal amount of $56,377.60. Id. at 33.

When a verdict is supported by competent evidence, the court usually leaves it as it is. When, however, there is no evidence to support an award, the court may take action to conform the award to the evidence. See, Weber Basin Water Conservancy District v. Skeen, supra.

An additur is a proper method of treating a situation where inadequate damages are awarded. See, Bodon v. Suhrmann, supra.

In the present case, the Masters' panel found the cost of masonry repairs to be $161,885. Mr. Bill Karren testified the cost of repair would be $161,885. No contrary evidence was admitted at trial. As a minimum, the masonry repair costs should be increased from $30,800 to $161,885.

Secondly, electrical repairs were $10,648 according to Bill Karren. No contrary evidence was admitted. The electrical award should be increased from $0 to $10,648.

Additionally, the following awards should be increased since no contrary evidence was produced at trial.

Roof and Floor Repairs	$31,514
Truss Repairs	10,549
Heating and Plumbing	24,200
West Exit Stairs	1,470
Architectural Costs	37,268
Miscellaneous Items	11,816
TOTAL COST OF ALL REPAIRS	$333,515

In addition, the moving and alternate space leasing costs were established at $351,604.20. No evidence to refute this amount was given and so the award should be increased to cover this damage which was undeniably shown to result from the masonry defects upon which judgment was directed for plaintiffs.

POINT V

IN THE ALTERNATIVE, PLAINTIFFS SHOULD HAVE A NEW TRIAL ON NEGLIGENCE, WARRANTY AND ON DAMAGES FOR NEGLIGENCE AND BREACH OF WARRANTY

The court ruled at trial and instructed the jury that defendants were negligent in constructing the building, yet the jury answered Question No. 1 that defendants were not negligent in constructing the building.

The jury answered question no. 4 "yes" thereby finding, of necessity, that the building was constructed with code violations (including of necessity the masonry defects). Having thus ruled, and given the court's instruction that defendants were negligent in construction of the masonry, there is no logical basis for finding that the workmanship warranties were not breached. Also, there is no basis for the "no" answer to question no. 1. Also, the court ruled and defendants stipulated to a breach of workmanship warranty. (Tr. p. 1640.)

The court having ruled on the masonry defects (as a result of defendants stipulation to be bound thereby) and defendants having so stipulated, there is no basis for finding there was no breach of warranties of occupancy and habitability.

The only way the jury could have answered "no", as it did, on question nos. 1, 4(b) and 4(e) would be to totally ignore the court's instructions and act out of prejudice or passion.

Failure of the jury to follow the instructions of the court on the law is sufficient basis for granting a new trial. Efco Distributing, Inc. v. Perrin, 17 Utah 2d 375, 412 P.2d 615 (1966); Matter of Acquisition of Property by Eminant Domain, 236 Kan. 417, 690 P.2d 1375 (1984); Cole v. Gerhart, 5 Ariz. App. 24, 423 P.2d 100 (1967); Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978); Salvail v. Great Northern Ry Co., 473 P.2d 549 (Mont. 1970); Price v. Sinnot, 85 Nev. 600, 460 P.2d 837 (1969) affd. 90 Nev. 5, 517 P.2d 1006 (1974).

It has also been held that where the interrogatory answers are inconsistent, a new trial is justified. Van Cleve v. Betts, 16 Wash. App. 748, 559 P.2d 1006 (1977).

A new trial is also proper where there is insufficient evidence to support the jury verdict. Efco Distributing, Inc. v. Perrin, supra; Villegas v. Bryson, 16 Ariz. App. 456, 494 P.2d 61 (1972).

The whole purpose of a new trial is to correct errors made at the trial. In the present case, the jury made obvious errors in not following the court's instruction on negligence and warranty and in not answering Questions No. 2 & 3. There are obvious errors and failures to follow the evidence in the jury's answers to Question No. 18.

As the court observed in Efco Distributing, Inc. v. Perrin, supra:

> If is clearly appears that there has been a miscarriage of justice because the jury has refused to accept credible, uncontradicted evidence where there is no rational basis for rejecting it, or it is plain to be seen that the jury has acted under a misconception of proven facts, or has misapplied or disregarded the law, or where it appears that the verdict was the result of passion and prejudice, it is both the prerogative and the duty of the court to set aside the verdict and grant a new trial.

In the present case, the findings of the jury do not follow the evidence. In the event the court does not grant the motion for judgment notwithstanding the verdict, plaintiffs' motion for judgment and the additur motion, a new trial should be granted on defendants' liability and on the damages resulting therefrom.

CONCLUSION

The jury's answers to the special verdict are in conflict and not justified under the evidence in the case and should not be allowed to stand. This is especially true of the failure to rule on the proximate cause issue on negligence and damages therefore.

The evidence at trial argues conclusively for a judgment notwithstanding the verdict and an additur as requested herein, or in the alternative, a new trial for plaintiffs as to the negligence issues and damages on negligence and warranty.

DATED this 15th day of October, 1990.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiffs

By: Edward T. Wells
EDWARD T. WELLS

Hand-Delivered to Court, March, 1988

Meetings - Engineers, Salt Lake County, plancheck, as-builts, permits, inspections, etc.		$ 1,500.00
General Supervision - Subs		950.00
Fees - Engineering, specs, as-builts, permit		7,000.00
Materials - Structural steel tube and plate, metal window framing, toilet partitions, grab bars, door closers, smoke seal, sheetrock, oak framing, studs, bolts, epoxy, concrete, paint, door hardware		7,350.95
Labor		
Structural and related	$3,552.00	
Toilet partitions, door closers, smoke seal	1,525.00	
Framing, wall repair	900.00	
Metal window framing	1,200.00	
Outside stair repair	875.00	
Tenting lighting	1,012.50	
General repair - grid blocking, piping, etc.	1,625.00	
Cleanup	95.00	
Delivery	133.63	10,918.13
		$27,719.81

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * *

ROBERT J. DEBRY and JOAN DEBRY, Plaintiffs, -vs- CASCADE ENTERPRISES, et al., Defendants.	Case No. C86-553 Honorable Pat B. Brian JURY TRIAL VOLUME IX
CANADA LIFE ASSURANCE CO., Plaintiff, -vs- ROBERT J. DEBRY, et al., Defendant.	

* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Salt Lake City, Utah

June 19, 1990

* * *

BRAD J. YOUNG
OFFICIAL COURT REPORTER

I N D E X

* * *

A. It is planned that way, yes. They had original plans on that job.

MR. WELLS: May I have a moment, your Honor?

THE COURT: You may.

(A brief pause in the proceedings.)

MR. WELLS: That's all I have.

THE COURT: Redirect?

MR. DEL BARTEL: None, your Honor.

THE COURT: You may step down. Have a nice day. Any objection to the witness being excused?

MR. WELLS: We have none.

THE COURT: Call your next witness.

MR. DEL BARTEL: We would call Dale Thurgood to the stand.

THE COURT: You have been previously sworn.

DALE THURGOOD,

called as a witness by and on behalf of the defendants, being previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEL BARTEL:

Q. Mr. Thurgood, you previously testified that Cascade reentered the building to make repairs in the fall of 1987. What prompted that action?

A. There was a hearing held in this courtroom, in which all of the parties to the suit at that time agreed that it

would be a wise idea to go in and try and fix whatever alleged problems there were, in order to mitigate the litigation.

Q. Did a scheduling and management order develop from that hearing?

A. Yes, it did.

Q. I show you what has been labeled as Exhibit AAA. Do you recognize that document?

A. This is a copy of the scheduling order which was drafted by the plaintiffs' attorney, Dale Gardiner, in August of 1987.

Q. Did you review that document after it had been prepared?

A. Yes, I did.

Q. Did you sign it?

A. Yes, I did.

Q. Did you sign a specific addendum at that time to it, as well as the original signing?

A. I affixed my signature to it, subject to the attached addendum which we sent with it when we signed the original.

Q. Did you proceed to take all the steps to reenter the building and correct cited defects based upon that scheduling order?

A. Yes, we did.

Q. Did you incur substantial costs as a result of that

document?

A. Yes, sir.

Q. I would like to refer you to paragraph 7 of the initial document, of the order itself. Would you read that to the jury.

A. "Thereafter, Cascade defendants and their subcontractors, agents and employees shall have access to the building up through November 2, 1987, for the purpose of correcting the alleged defects and code violations set forth in the plaintiffs' affidavits for summary judgment heard by the Court on July 30, 1987. Those affidavits were submitted by Kenneth Karren, Jr., Niels Valentiner, Ted Wilson, Frank Liebrock. In carrying out their work, Cascade defendants will not further encumber the building. They will provide liability insurance for their workers. Cascade shall provide a copy of this order to all subcontractors who work on the property."

Q. Were those the same affidavits that Mr. Wells referred to earlier in trial as the documents that he insisted that we had reviewed or relied upon?

A. Those were the same affidavits Mr. Wells spent two days grilling me on.

Q. Would you read paragraph 8 of the document.

A. "Plaintiffs' expert witnesses shall be -- plaintiffs' experts shall reasonably cooperate with Cascade

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * *

ROBERT J. DEBRY and JOAN DEBRY, Plaintiffs, -vs- CASCADE ENTERPRISES, et al., Defendants.	:	Case No. C86-553 Honorable Pat B. Brian JURY TRIAL VOLUME V
CANADA LIFE ASSURANCE CO., Plaintiff, -vs- ROBERT J. DEBRY, et al., Defendant.	:	

* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Salt Lake City, Utah

June 6, 1990

* * *

BRAD J. YOUNG
OFFICIAL COURT REPORTER

I N D E X

* * *

the noon recess, remember the previous admonition of the Court. Do not discuss the case among yourselves, do not permit anyone to discuss the case in your presence, do not form nor express an opinion in this matter until it has been submitted to you for your deliberation and your decision. Have a nice lunch. The Court will be in recess until 1:30.

(A lunch recess was taken.)

THE COURT: The record will reflect the presence of the jury, the alternate, counsel and the parties. You may proceed.

MR. WELLS: Before we proceed, as your Honor will recall, I indicated to you during the recess that Mr. Debry had a personal matter that would necessitate his being absent for an hour or two. The Court has indicated there will be no problem with that.

THE COURT: The record will reflect that the absence was noted to the Court in advance.

Q. Mr. Thurgood, Mr. Wells previously contended that you did not go out and hire new engineers when defect reports began to flow from the Debrys. Why not?

MR. WELLS: Your Honor, I am going to object to the form of the question. The testimony was that the defect reports came from engineers, not from the Debrys.

THE COURT: Sustained.

Q. Why didn't you go out and hire new engineers when

you received the various defect reports that Mr. Debry showed you here today?

A. We had contractual obligations with all of our subcontractors who had performed the work, which was being alleged as defective, and felt that those subcontractors were competent and certainly had the right to address those issues, and we had a legal obligation to allow them to do so.

Q. Did you subsequently contact those subcontractors?

A. Yes, we did.

Q. Why was there a delay between the time that you saw the reports and that subcontractors or Cascade reentered the building to address them?

A. At the end of 1986 and into 1987, through about August or September, we were locked off of that job, and it was in September we finally received a court order, allowing us to go into that building.

Q. Isn't it true that even when we got -- when the first court order was obtained to enter the building, that Debrys still prevented that entering?

A. That's true.

Q. Did the subcontractors subsequently go back into the building in 1987?

A. Yes, they did.

Q. Prior to their reentering the building, was a new building permit obtained from the county?

A. We obtained a new building permit in November 1987, prior to their being allowed to start any work.

Q. Wasn't that permit based upon a new set of plans and specifications?

A. Yes, it was.

Q. Wasn't it also based upon the report of David Christensen, who is an engineer?

A. His report was included with the new plans, yes.

Q. And wasn't the reports of the plaintiffs, that were presented here today -- weren't they included and presented to the county?

A. The county utilized those reports in going over the new plans --

MR. WELLS: I am going to object, move to strike his testifying as to what the county did. I don't think there is any basis for that.

THE COURT: Sustained.

MR. WELLS: May it be stricken?

THE COURT: That portion that refers to matters that are beyond the firsthand knowledge of the witness are stricken.

Q. Mr. Thurgood, did you meet with Carl Eriksson of the county to review the plans and specifications?

A. Yes, I did.

Q. Did Mr. Eriksson show you reports that he received

from the Debrys?

A. Yes, he did.

Q. Were those reports -- did they reflect essentially the same items that were discussed here today?

MR. WELLS: Objection, the reports are the best evidence of what they reflected.

THE COURT: Overruled.

A. Yes, they did.

Q. Isn't it true that the county issued a second permit, and approved a second set of plans, based upon all that input?

A. They did.

Q. Isn't it also true that the subcontractors reentered the building, based upon all of the new information that was presented to the county and approved?

A. That's correct.

Q. And isn't it also true that at each inspection that was made on the building, after the subcontractors had performed work again, and readdressed all those issues, that the plaintiffs' engineer was called prior to every inspection, to allow him to enter onto the premises at the time of the inspection?

A. Yes.

MR. WELLS: Objection, foundation. May we have some foundation?

THE COURT: Overruled. It is a matter for redirect.

Q. Do you know for a fact that plaintiffs' engineers were called prior to the county agreeing to make inspections on that building?

A. I was present or in the presence of county inspectors when they called, at least Mr. Karren, and held the inspections -- not Bill Karren, Jr., I believe his father -- until he arrived, before those inspections were held.

Q. Wasn't the building approved again by the county, subject to a set of items that needed to be completed?

MR. WELLS: Objection, calls for a conclusion.

THE COURT: Overruled.

A. Yes, it was.

Q. Didn't this Court call upon the county to provide an affidavit, outlining the items that needed to be completed in the building, subsequent to those inspections?

A. Yes, they did.

Q. Was an affidavit subsequently provided?

A. Carl Eriksson provided one to the Court.

MR. DEL BARTEL: Your Honor, if I may.

THE COURT: You may.

Q. Mr. Thurgood, I will show you what is labeled Exhibit L. Is that the affidavit that Carl Eriksson, or a copy of it, that Carl Eriksson provided to the Court?

A. Yes, it is.

Q. In reviewing that document, what items needed to be addressed for final occupancy to be given on the building?

MR. WELLS: Objection, the document is hearsay. It hasn't been admitted. It is improper to read a document unadmitted.

THE COURT: Sustained.

MR. DEL BARTEL: I ask that the document be admitted.

MR. WELLS: Objection, hearsay.

THE COURT: What is the document?

(A brief pause in the proceedings.)

THE COURT: Approach the bench, please.

(An off-the-record discussion at the bench.)

Q. Were you informed by the county, after a series of inspections had been made on the building, pursuant to going in in 1987, what remained to be done?

A. After --

MR. WELLS: Your Honor, it calls for a yes or a no.

A. Yes.

Q. What remained to be done?

MR. WELLS: Objection, hearsay.

THE COURT: Overruled.

A. After the last inspection, which I attended, was held by the county, I was informed there were four items left to be addressed before certificate of occupancy would be

issued.

Q. Do you recall those four items?

A. Yes, I do.

Q. And what are they?

A. That either wire glass had to be installed in the south side of the building, and a parapet wall installed on the south side of the building, or, in the alternative, a four-foot easement or purchase of property from the neighbor on the south, that door coordinators had to be put on the two sets of eight-foot doors in the building, and that a broken truss had to be repaired.

Q. To the best of your knowledge, right today, have those items been resolved?

A. Every one.

Q. Are you aware of the plaintiffs submiting any other documents to the county, citing any further defects?

A. I don't know whether they have, or not. I don't believe so. I may retract that. They probably haven't sent them a copy of the Master's report.

Q. Mr. Thurgood, questions were given to you with regard to Valley Mortgage making any extensions on the construction loan on that building. Your response was -- the question was, were there any further extensions after October? And you said yes. Did you ever receive a document which showed that Valley Mortgage was willing to extend that loan?

355-7533
629 East 400 South
Salt Lake City, Utah 84102

Our File No. UT-105660

CLOSING STATEMENT

EXHIBIT "F"

1—Seller CASCADE ENTERPRISES, a General Partnership Address

2—Buyer ROBERT J. DEBRY JOAN DEBRY Address

3—Property Part of Lots 14 and 15, Blk. 6, 10 Acre Plat "A", B.F.S. Type Commercial - Office Building Address 4252 South 700 East, SLC, Utah

4—Offer date 5-20-85 Closing date 12-13-85 Possession date 12-13-85 Title Insurance

	CREDIT TO BUYER	CREDIT TO SELLER
5—Sale price		625,000.00
6—Earnest money held by Scott McDonald Realty (See line 35)	1,000.00	
7—~~Mtg/TD/Contract~~ in favor of Dale Thurgood & Del Bartel-2nd	62,500.00	
8—Interest % from to		
9—Tax No. 22-05-105-003 1985 $ 503.17 from 12-13-85 to 1-1-86		26.22
10—Prorated Ins. $, Prem. $, Exp. Term		
11—Co. Buyers will arrange own Policy No.		
12—Agent insurance coverage Address		
13—FHA-MIP Insurance Premium (Due)		
14—Reserves for Taxes and Insurance held by Lender		
15—~~Prorated Rents~~ Credit for Commission being paid, per agree.	25,000.00	
16—Credit and allowances due Buyer from Seller, per agreement	10,900.00	
17—Credit due Seller for change orders and additions, per agr.		37,512.79
18—Loan Commitment Fee Credit due Buyer, per agreement	5,000.00	
19—Extension of Loan Commitment due Buyer, per agreement	7,726.08	
20—Totals	112,126.08	662,539.01
21—Balance due Seller (Enter on lines 23 and 34)	550,412.93	
22—Totals (Must balance)	662,539.01	662,539.01

BUYER'S STATEMENT	DEBIT	CREDIT
23—Balance due seller as shown on line 21	550,412.93	
24—To record deed from seller to buyer & 2nd Trust Deed	15.00	
25—Examining title or abstract		
26—Closing Fee Due Utah Title Co.	150.00	
27—Loan Transfer Fee		
28—Credit for Loan Proceeds - Richards Woodbury Mortgage Corp.		485,973.35
29—		
30—		
31—		
32—Total balance due from buy		
33—Totals		

34—Due Seller from
35—Earnest Money
36—~~Contract~~
37—Closing
38—Real E
39—Pay
40—
41—

*The Abstra recorded against sell pay #41 &

BUYER ROBERT

BUYER JOAN DEBRY

NOTE: TITLE PARTIES U TRANSFERRED AS

EDWARD T. WELLS - A3422
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Telephone (801) 262-8915

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

In re	)	
	)	Bankruptcy No. 88C-01188
UTAH TITLE & ABSTRACT COMPANY,	)	Chapter 7
	)	
Debtor.	)	

AMENDED NOTICE OF CLAIMS

Pursuant to the Order of the Court, given in open court on May 20, 1994, Robert J. DeBry and Joan DeBry herewith provide the following notice to Dale Thurgood and Del Bartel of the nature of the claims presently being made by the DeBrys against the escrow funds which the Trustee has available for distribution from the Utah Title escrow.

1. The monies held by the Trustee were escrowed at the time of closing to pay amounts due to subcontractors and others who had worked on the building at 4152 South 700 East, including Cascade Construction Company.

2. The sum of $663.59 was payable in part to Zephyr Electric. The DeBrys obtained a judgment against Zephyr Electric for work not completed on the building at 4252 South 700 East. Since the money held by the Trustee was to pay Zephyr, in part for

its uncompleted work, that money should be applied against the Zephyr judgment (copy attached as Ex. A).

3. The sum of $3,536.06 was allocated to Cascade Construction Company or Cascade Enterprises, partnerships of Mr. Thurgood and Mr. Bartel. As the general partner who sold the building and built the building, the partners are responsible for defalcations by subcontractors and the monies allocated to Cascade should be applied to satisfy the judgment of Zephyr.

4. The sum of $5,400.00 was allocated to Building Systems. The documents attached as Ex. B show that DeBrys paid Building Systems and assumed the position of Building Systems and are entitled to monies payable to Building Systems.

For the above reasons, the monies allocated to Zephyr Electric, Building Systems and Cascade should be paid to the DeBrys.

DATED this 2nd day of June, 1994.

ROBERT J. DEBRY & ASSOCIATES

EDWARD T. WELLS